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In The

# Supreme Court of the United States

HARBER CORPORATION, MABON CORPORATION, GATEX CORPORATION, PIEDADE PEDRO ALMEIDA, AVION RESOURCES LTD., FARES BAPTISTA PINTO, JOSE BAPTISTA PINTO NETO, TIGRUS CORPORATION, POMPEU COSTA LIMA PINHERIO MAIA, AND ISABEL CRISTINA DURTA PINHEIRO MAIA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case presents two important, unresolved, and recurring issues of federal law.

The first issue, on which the Courts of Appeals have split, is whether the Government, when it is ordered to make restitution of illegally seized funds to an innocent owner, may also be ordered, pursuant to a federal common law doctrine first recognized in *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995), to disgorge interest earned or realized on the funds. The Third Circuit declined to order the Government to disgorge interest here, thereby rejecting holdings of the Sixth, Ninth, and Eleventh Circuits and the Court of Federal Claims. Instead, it followed rulings made by the First, Second, Eighth, and Tenth Circuits.

The second issue involves the proper interpretation of an important remedial provision of federal forfeiture law, 28 U.S.C. § 2465(b)(1), which provides that the United States "shall be liable" for attorneys' fees and costs incurred by claimants who substantially prevail "in any civil proceeding to forfeit property under any provision of Federal law." The petitioners here, property owners who were not charged with any crime by the Government, successfully contested *in personam* forfeiture proceedings conducted by the Government under 21 U.S.C. § 853.

**QUESTIONS PRESENTED** – Continued

The Court of Appeals held that petitioners were not entitled to fees and costs because, in its view, the petitions to challenge the forfeiture, which they filed under 21 U.S.C. § 853(n), commenced proceedings to exclude property from forfeiture and therefore were not part of "a proceeding to forfeit property." This issue is presented in a pending petition for a writ of *certiorari*, which was filed on April 8, 2010, in *Jewell v. United States* (captioned below as *United States v. Moser*, 586 F.3d 1089 (8th Cir. 2009)).

## PARTIES TO THE PROCEEDINGS

The petitioners are Avion Resources Ltd., Tigrus Corporation, Fares Baptista Pinto, Jose Baptista Pinto Neto, Pompeu Costa Lima Pinherio Maia, Isabel Cristina Durta Pinheiro, Piedade Pedro Almeida, Harber Corp., Gatex Corp., and Mabon Corp.

The respondent is the United States of America.

Maria Carolina Nolasco is the criminal defendant in this matter and is a party no longer interested in these proceedings.

## CORPORATE DISCLOSURE

The following petitioners, which are corporations, hereby identify all parent corporations and any publicly held company that owns 10% or more of the corporation's stock: none.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* issue to review the final Judgment of the United States Court of Appeals for the Third Circuit.

## OPINION AND JUDGMENT BELOW

The District Court's opinion, unofficially reported at 2008 U.S. Dist. LEXIS 93200 (D.N.J. Nov. 17, 2008), is reprinted in the Appendix ("Pet. App.") at Pet. App. 20-31. The opinion of the Court of Appeals is unofficially reported at 2009 U.S. App. LEXIS 26368 (3d Cir. Dec. 4, 2009) and is reprinted at Pet. App. 3-17.

## STATEMENT OF JURISDICTION

The District Court had jurisdiction over the proceedings below pursuant to 28 U.S.C. § 1331, 21 U.S.C. § 853(n) and 28 U.S.C. § 2465(b)(1). Pet. App. 20. The Court of Appeals issued its Judgment on December 4, 2009. Pet. App. 1-2. A Petition for Rehearing and Rehearing *en banc* was denied by the Court of Appeals on February 9, 2010. Pet. App. 32-33. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 U.S.C. § 2465 provides that:

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –

(A) reasonable attorney's fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale –

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency,

or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

In pertinent part, 21 U.S.C. § 853 provides that:

(n) Third party interests.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the

property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because

the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonable without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

## STATEMENT OF THE CASE

On June 27, 2002, the Government seized 39 individually owned bank accounts at Merchant's Bank of New York in New York City containing more than $21 million. Pet. App. 35. The seizures were made in connection with the arrest of Maria Carolina Nolasco, an officer of the Bank, on personal income

tax evasion and other charges, including a charge that she was personally operating a money transmitting business without a license required under state law in violation of 18 U.S.C. § 1960. Pet. App. 35. The owners of the 39 accounts, including the 10 petitioners herein, were not charged with any crime. No forfeiture or other proceedings concerning the seized funds were filed and no action was taken by the Government in the Nolasco case during the next two years.

After several of the petitioners filed equitable actions in the United States District Court for the Southern District of New York seeking to recover their property, the Government in September 2004 initiated criminal forfeiture proceedings aimed at the seized funds pursuant to 21 U.S.C. § 853. The forfeiture proceeding was filed in New Jersey, where Nolasco lived and was being prosecuted. The Government sought criminal forfeiture of the funds, an *in personam* proceeding that extends only to property owned by the criminal defendant, even though the funds were seized from petitioners' bank accounts and indisputably were not owned by defendant Nolasco.

It took until June 2006 for petitioners to obtain a ruling on the merits of their claims to recover their property: the District Court in New Jersey granted petitioners' motions for summary judgment prior to the date scheduled for oral argument and ordered the Government to return the funds. Pet. App. 32-54. The District Court ruled that "[a]fter four years, it is

neither legal nor just" to permit the Government to continue to retain possession of the seized property. Pet. App. 41. The Government did not appeal.

Nor did it return the funds to the petitioners. Rather, the Government caused a New York State criminal prosecution and forfeiture proceeding to be instigated against each of the 22 parties who had prevailed in the New Jersey District Court litigation. Pet. App. 61. The Government transferred petitioners' funds back to New York. The Government retained millions of dollars belonging to the other account parties who, for whatever reasons, did not file petitions challenging the forfeiture, even though those funds also were not owned by Nolasco and were thus not subject to forfeiture. Pet. App. 55-57.

After further extensive litigation in the courts of the State of New York, two separate *ex parte* Orders of Attachment of the funds issued by the New York State Supreme Court, New York County, were vacated and the funds again ordered released. A unanimous panel of the Appellate Division of the Supreme Court affirmed, holding that the attachment was done "without valid judicial sanction," was "extrajudicial" in nature, and accomplished "in contravention . . . of the order of the New Jersey federal court ruling that defendants were entitled to return of their money [and] without statutory authorization." *Morgenthau v. Avion Resources Ltd.*, 49 A.D.3d 50 (1st Dep't 2007), *rev'd on other grounds*, 11 N.Y.3d 383 (2008). Pet. App. 65, 69. As the case was being appealed further by the District Attorney

to the New York Court of Appeals, the funds were transferred out of New York to an account under the control of the Department of Justice in Washington, D.C., ostensibly pursuant to Mutual Legal Assistance Treaty (MLAT) requests received from Brazil, which had been made years earlier. Pet. App. 6. Applications to release the funds are *sub judice* before the United States District Court for the District of Columbia. *In re Seizure Of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency*, Misc. Action No. 08-261 (RMC) (D.D.C.).

As the New York litigation was ongoing, petitioners filed a motion in the United States District Court in New Jersey under 28 U.S.C. § 2465(b)(1), which requires that the Court award attorneys' fees, costs, and interest on seized monies to any claimant who prevails "in any civil proceeding to forfeit property under any provision of federal law." Petitioners sought in the alternative to disgorge interest realized by the Government on their funds under the doctrine recognized in *United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *Carvajal v. United States*, 521 F.3d 1242 (9th Cir. 2008); and *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998).

The District Court denied the motion, holding that while the proceeding was civil in nature and petitioners clearly prevailed, the proceeding was not one "to forfeit property." Pet. App. 18-19. The Court declined to follow *United States v. D'Esclavelles*, 541

F. Supp. 2d 794 (E.D. Va. 2008), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009), where the Court awarded fees and interest to a party prevailing in a proceeding under 21 U.S.C. § 853(n). Pet. App. 26-28. The District Court found that petitions filed under 21 U.S.C. § 853(n) "did not purport to forfeit property;" rather, they "served as an attempt to intervene in and block the Government's attempt to seize the property in the criminal forfeiture proceeding it initiated." Pet. App. 27. In so ruling, the District Court ignored the reality that the end result sought by the Government in the statutory process under 21 U.S.C. § 853, in which petitioners participated and prevailed, was to forfeit petitioners' property.

The Court of Appeals affirmed, agreeing with the Government's characterization of the proceedings as analogous to actions to "quiet title." Pet. App. 11. The Court noted that a 21 U.S.C. § 853(n) proceeding "cannot result in the forfeiture of a claimant's property;" rather, the "proceeding merely ensures that property belonging to a third-party claimant is not inadvertently forfeited as part of a criminal defendant's property." Pet. App. 11-12. According to the Court, before the third-party petitions are filed under § 853(n), "[f]orfeitability has already been proven," which it said "demonstrates that Section 853(n) ancillary proceedings exclude property from forfeiture and do not 'forfeit property' as required by Section 2465(b)." Pet. App. 12. The Court also said that a proceeding under § 853(n) "should be viewed as

part and parcel of the larger *criminal* forfeiture proceeding" even though the proceeding is "civil in nature." Pet. App. 12. Applying 28 U.S.C. § 2465(b) to such a proceeding would, in the view of the Court of Appeals, "frustrate Congress' intent to reform *civil* forfeiture proceedings." Pet. App. 13.

The Court of Appeals also held that the United States was not required to disgorge the interest it had earned on petitioners' funds, Pet. App. 15-17, declining to follow precedents from the United States Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits, as well as a number of other courts, including the United States Court of Federal Claims. *See, e.g., Carvajal v. United States*, 521 F.3d 1242 (9th Cir. 2008); *United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *American Airlines, Inc. v. United States*, 77 Fed. Cl. 672 (2007), *aff'd*, 551 F.3d 1294 (Fed. Cir. 2008). The Court held that this line of cases was "at odds" with the general "no interest" rule set forth in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Pet. App. 16. There is now a substantial conflict on this issue among the Courts of Appeals.

The Court of Appeals designated its opinion in this case as "Not Precedential" under a local rule. Pet. App. 3, 5. The Government subsequently moved to publish the Panel's Opinion, contending that "[b]oth holdings decided issues of first impression in this Circuit." Pet. App. 75-78. The Government argued

that "the two issues resolved by the Panel are likely to recur," pointing out that because there are "numerous statutes giving rise to criminal forfeiture," publishing the Opinion "will ensure that district courts faced with [third party claims in *in personam* forfeiture matters] know the rules regarding whether attorney's fees and interest are available." Pet. App. 76-77. The Court of Appeals denied the Government's motion without comment.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS ON THE ISSUE OF WHETHER THE GOVERNMENT AS PART OF ITS OBLIGATION TO MAKE RESTITUTION CAN BE ORDERED TO DISGORGE INTEREST ON ILLEGALLY SEIZED FUNDS

The Courts of Appeals are sharply divided on the first issue presented by this case, which is whether the Government, when it is ordered to make restitution of funds seized in a forfeiture case to an innocent owner, may also be compelled to disgorge interest constructively or actually received on the funds without violation of its sovereign immunity. This issue should be heard and finally resolved by this Court.

The rule that the Government should not be permitted to retain interest actually or constructively obtained on funds illegally held was first recognized in a forfeiture case, *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995), which was decided five years before the enactment of 28 U.S.C. § 2465(b)(1). There, the Court of Appeals first rejected the property owner's claim for pre-judgment interest on his funds, concluding that in the absence of a clear waiver of the Government's sovereign immunity, the "no interest" rule barred the claim, citing *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

However, the Court recognized that "not every payment of money by the government related to something it has seized can be characterized as a forbidden award of pre-judgment interest." Citing its holdings in *United States v. 1980 Lear Jet*, 25 F.3d 793 (9th Cir. 1994), and *United States v. Real Property Located at 41741 Nat'l Trails Way*, 989 F.2d 1089 (9th Cir. 1993), the Court found that "while sovereign immunity will prevent a simple claim for pre-judgment interest, the government is not always free to profit from wrongly seized property without recourse by the owner." The Court explained:

> We believe the law is reasonably clear: the government is not liable to suit for inchoate interest, as an item of damages in a forfeiture action. However, as a matter of practice, assets amenable to such treatment should be put to use, with their increase accruing ultimately to whatever party is

> found to have the right to the property. Where such a course has been followed, actually or constructively, as in this case, the government will not be allowed to retain the fruits, once the tree has been ordered returned to its owner.

*United States v. $277,000 U.S. Currency*, 69 F.3d at 1497. As the Ninth Circuit explained, the interest recovered is not "typical pre-judgment interest, but an aspect of the seized *res*, and thus the existing sovereignty bar to an award of pre-judgment interest did not enter the picture."

This issue has divided the Circuits. In addition to the Ninth Circuit, the Courts of Appeals for the Sixth and Eleventh Circuits have held that the Government may be ordered to disgorge interest earned on illegally seized funds. *See United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. Ford*, 64 Fed. Appx. 976 (6th Cir. 2003); *United States v. $515,060.42 U.S. Currency*, 152 F.3d 491 (6th Cir. 1998). The Seventh Circuit has recognized the disgorgement principle established in *United States v. $277,000 U.S. Currency* but has not yet taken a definitive position. *See United States v. Rand Motors*, 305 F.3d 770 (7th Cir. 2002) (Wood, J.). A number of lower courts have recognized that disgorgement may be ordered. *See, e.g., Hatalmud v. Riley*, 2005 U.S. Dist LEXIS 32303 (S.D.N.Y. 2005), *rev'd on other grounds*, 505 F.3d 139 (2d Cir. 2007); *United States v. Tencer*, 986 F. Supp. 361 (E.D.. La. 1997).

Four Courts of Appeals previously have held that sovereign immunity generally precludes the disgorgement of interest earned by the Government on illegally seized funds. *See Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998); *United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843 (8th Cir. 1999); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610 (10th Cir. 2000), *cert. denied*, 534 U.S. 836 (2001).

This issue is potentially of importance in other contexts, where the Government has derived a benefit from funds taken from an owner and are later ordered returned. *See, e.g., American Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 2007 U.S. Claims LEXIS 236 (Ct. Fed. Claims 2007) (relying upon *United States v. $277,000 U.S. Currency* to order Government to disgorge interest realized on illegally collected airline user fees), *aff'd*, 551 F.3d 1294 (Fed. Cir. 2008).

The core concept here is restitution, which is designed to prevent the unjust enrichment of the defendant rather than compensate for a loss suffered by the plaintiff. *See City of Monterey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 710 (1999); *see also Bowen v. Massachusetts*, 487 U.S. 879, 893-894 (1988) ("Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief

– which may include an order providing for . . . 'the recovery of specific property or monies'") (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). Thus, as a general rule, "[w]henever the defendant holds money or property that belongs in good conscience to the plaintiff, and the objective of the court is to force disgorgement of his unjust enrichment, interest upon the funds or property so held may be necessary to force complete restitution." 1 D. Dobbs, *Law of Remedies* § 3.6(2), at 344 (2d ed. 1993).

The Government can of course be ordered to make restitution of property without violating its sovereign immunity. For example, the United States may be compelled by motion made pursuant to Fed. R. Crim. P. 41(g)[1] to return seized property. *See Adeleke v. United States*, 355 F.3d 144, 151 (2d Cir. 2004) ("Rule 41(g), which simply provides for the return of seized property, does not waive the sovereign immunity of the United States"). Where a criminal proceeding is not pending, a property owner

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[1] Federal Rule of Criminal Procedure 41(g) provides that:

> Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

may file an independent action to compel the United States to return property under the general equity jurisdiction of the district courts. *See Lavin v. United States*, 299 F.3d 123, 127 (2d Cir. 2002). These restitutionary claims lie against the United States as a matter of equity, if not constitutional imperative. *Cf. Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304-05 (1923) (the constitutional right to just compensation for private property taken by Government "rests on equitable principles" and thus includes interest from the date of the taking, without need for statutory authorization).

We submit that disgorgement of interest earned on funds taken and held by the Government is consistent with the equitable principles under which restitution of the property itself is ordered, and does not violate the sovereign immunity of the United States. This important and unresolved issue of law is worthy of review by this Court in this matter.

## II.

## THE COURT SHOULD RESOLVE THE ISSUE WHETHER CONGRESS INTENDED IN 28 U.S.C. § 2465(b)(1) TO DENY INNOCENT PROPERTY OWNERS WHO PREVAIL IN FORFEITURE PROCEEDINGS FILED BY THE GOVERNMENT UNDER 21 U.S.C. § 853 THE RIGHT TO RECOVER ATTORNEYS' FEES, COSTS, AND INTEREST

28 U.S.C. § 2465(b)(1) provides that a claimant who substantially prevails "in any civil proceeding to

forfeit property under any provision of Federal law" is entitled to recover his attorneys' fees and litigation costs. Furthermore, where the property seized by the Government was money, the statute requires the Court to award the prevailing party pre-judgment interest. This provision, part of the CAFRA remedial legislation enacted in 2000, was Congress's response "to public outcry over the government's too-zealous pursuit of civil and criminal forfeiture." *United States v. Khan,* 497 F.3d 204, 208 (2d Cir. 2007).

The Government's view, adopted by the Court of Appeals here, is that the phrase "any civil proceeding to forfeit property under any provision of Federal law" actually means that only claimants prevailing in *in rem* forfeiture cases, which are filed under 18 U.S.C. § 983, have the right to recover attorneys' fees, costs, and interest. If the holding of the Court of Appeals is allowed to stand, property owners prevailing in forfeiture proceedings filed by the Government under 21 U.S.C. § 853, which are *in personam* in nature, will have no right to be made whole.

The phrase "*in rem*" is not in 28 U.S.C. § 2465. Nor is there any reference in the statute, or the legislative history, to forfeiture proceedings filed under the *in rem* forfeiture statute, 18 U.S.C. § 983. Rather, Congress chose to use expansive, unrestricted language – "any civil proceeding to forfeit property under *any provision of Federal law.*" If Congress intended only to grant claimants prevailing in *in rem* forfeiture actions the right to recover fees, costs, and

interest, it could have easily said so by using appropriate limiting language; for example, by providing that "fees, costs and interest shall be awarded to any claimant prevailing in a forfeiture proceeding filed under 18 U.S.C. § 983."

Congress's decision not to limit the remedy it created to a particular forfeiture statute or proceeding should be given effect. The plain words of the statute indicate that Congress intended to make innocent property owners aggrieved by baseless forfeiture cases whole, without limitation. Of course, as a remedial statute, 28 U.S.C. § 2465(b)(1) should be liberally and beneficently construed to carry out the reforms intended by Congress and to promote justice. *See Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987).

The narrow interpretation given the statute by the Court of Appeals has created an anomaly in forfeiture law that is impossible to reconcile with Congressional intent. Successful claimants in *in rem* forfeiture cases filed under 18 U.S.C. § 983 have a statutory right to recover attorneys' fees and interest on seized funds. Successful claimants in *in personam* forfeiture cases filed by the Government under 21 U.S.C. § 853 have no such rights. Could Congress have intended this disparate treatment? The clear answer is no.

It would be peculiar to treat property owners contesting forfeiture cases differently. The lower

courts have noted that it is "fundamentally unfair for the availability of attorney's fees to hinge upon the choice of the U.S. to bring the action under the civil or criminal forfeiture statute." *United States v. Bachner*, 877 F. Supp. 625, 627 (S.D. Fla. 1995); *United States v. D'Esclavelles*, 541 F. Supp. 2d 794, 769 (E.D. Va. 2008) ("applicability of the attorney's fees provision of CAFRA turns on the status of the claimant and the nature of the proceeding for which attorneys' fees are sought, not on how the government chose to initiate the seizure"), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009). The oddity of granting successful claimants in *in rem* forfeiture cases fees, costs, and interest and denying that to successful claimants in *in personam* forfeiture cases is manifest when it is realized that the Government now has complete discretion to file either an *in rem* or an *in personam* forfeiture proceeding in any case. *See* 28 U.S.C. § 2461(c). The Government in fact has shown a preference for pursuing forfeiture through *in personam* proceedings in recent years, a fondness likely to grow stronger if 28 U.S.C. § 2465(b)(1) is held not to apply to such cases.

It was well established by the time CAFRA was enacted in 2000 that petitions filed by property owners under 21 U.S.C. § 853(n) seeking to recover their property seized in *in personam* forfeiture proceedings were considered to be civil in nature. *See United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991) (holding that proceedings filed by third

party under 21 U.S.C. § 853(n) "are civil in nature . . . even though they derive from a prior criminal prosecution"); *United States v. Schwimmer*, 968 F.2d 1570, 1574 n.3 (2d Cir. 1992) (citing with approval the "well-reasoned analysis" of the Third Circuit in *Lavin*); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996) ("we will follow the Third Circuit's approach [in *Lavin*] . . . and hold that the third party proceeding [under 21 U.S.C. § 853(n)] is civil in nature").

We must assume Congress was aware of these holdings when it drafted 28 U.S.C. § 2465(b)(1). *See Evans v. United States*, 504 U.S. 255, 259 (1992) (where appellate court decisions on a point of law exist, Courts will conclude that "Congress is aware of the prevailing view" when it amends a statute); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (Court can presume that Congress is aware of settled judicial constructions of existing law).

Congress's choice of the broad language "any civil proceeding under any provision of Federal law" in 28 U.S.C. § 2465(b)(1) must be analyzed in the context of the established judicial view that proceedings filed by third party claimants in *in personam* forfeiture proceedings were civil proceedings, strongly indicating that Congress intended to treat prevailing claimants in such proceedings the same as prevailing claimants in *in rem* forfeiture proceedings. There is no indication in the statute or its scant legislative

history[2] that Congress intended disparate treatment of innocent property owners contesting forfeiture. Perhaps even more importantly, there is no reason why Congress would choose to make such a distinction either. Although the Government vigorously argues that Congress did not intend to grant fees to successful claimants in *in personam* forfeiture cases, it has yet to offer a reason why Congress would want to make such a distinction.

Furthermore, the statutory construction the Court of Appeals employed does not withstand analysis. The Court held that a 21 U.S.C. § 853(n) proceeding "cannot result in the forfeiture of a claimant's property;" rather, the "proceeding merely ensures that property belonging to a third-party claimant is not inadvertently forfeited as part of a criminal defendant's property." Pet. App. 11-12. The Court held that before the third party petitions are filed, "[f]orfeitability has already been proven," which it said "demonstrates that Section 853(n) ancillary proceedings exclude property from forfeiture and do not 'forfeit property' as required by Section 2465(b)." Pet. App. 12.

This is mere word-smithing and ignores the reality of *in personam* forfeiture proceedings. Property

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[2] The best the Government can muster is a comment by Senator Hatch that the bill contained a provision allowing property owners "who prevail against the government in civil forfeiture actions" to recover fees. There is no committee report or any other illuminating legislative history.

owners whose funds are seized in connection with a criminal prosecution of another party, and as to which an *in personam* forfeiture claim is filed under 21 U.S.C. § 853, are restricted by law to filing petitions seeking to recover their funds after the defendant has been convicted. *See* 21 U.S.C. § 853(k) (party claiming interest in property subject to *in personam* forfeiture case filed by Government may not intervene in case or file an action, other than a petition under 21 U.S.C. § 853(n), which is permissible only after preliminary forfeiture order is entered against the criminal defendant after conviction).

The Government does not obtain title to the property specified in the "preliminary order of forfeiture," Fed. R. Crim. P. 32.2(b), until a "final order of forfeiture" is entered, Fed. R. Crim. P. 32.2(c)(B)(2). Under 21 U.S.C. § 853(n)(7), a "final order of forfeiture" may only be entered *after* the Government provides notice of "its intent to dispose of the property" to any party "known to have alleged an interest in the property" that is the subject of the "preliminary order of forfeiture, and either (A) the time for a party claiming an interest in the property to "petition the court for a hearing to adjudicate the validity of his alleged interest in the property" has expired or (B) all petitions that have been filed are disposed by the Court.

Unquestionably, the Government does not and cannot obtain title to property in an *in personam* forfeiture case until it complies with the procedures provided in 21 U.S.C. § 853(n), including the Court's

disposition of all petitions filed by third parties claiming an interest in the property. Given that the Government cannot convert a "preliminary order of forfeiture" into a "final order of forfeiture" unless and until it completes the procedures and proceedings provided for in 21 U.S.C. § 853(n), proceedings under § 853(n) are by definition part of the proceedings "to forfeit property." *See United States v. Moser*, 586 F.3d 1089, 1095 (8th Cir. 2009) (expressing doubt that proceedings under 21 U.S.C. § 853(n) are not part of the proceedings to forfeit property, noting that "the government does not possess clear title to the seized property until after the conclusion of § 853(n) proceedings (or until after the posting of notice in the absence of any petitions)"), *petition for writ of certiorari filed sub nom., Jewell v. United States* (petition filed on April 8, 2010).

The view of the Court of Appeals that once a "preliminary order of forfeiture" has been entered "[f]orfeitability has already been proven" is dubious, at best. In reality, forfeitability is determined later, in the proceedings held on petitions filed under 21 U.S.C. § 853(n). It is true that the Court is supposed to assure itself before entering a "preliminary order of forfeiture" that the criminal defendant has an interest in the property, since criminal forfeiture is *in personam* in nature and only property in which the criminal defendant has an interest is subject to forfeiture. *See, e.g., United States v. Bajakjian*, 524 U.S. 321, 328 (1998); *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001); *United States v. Lester*, 85 F.3d 1409, 1413 (9th Cir. 1996).

However, there is no real procedure in the existing rules for the courts to make this determination before the "preliminary order of forfeiture" is entered. As David Smith, the leading forfeiture law commentator, notes in his treatise:

> *Unfortunately, the Rule [32.2 of the Federal Rules of Criminal Procedure] does not provide a procedure by which the court can determine whether the defendant had an interest in the property and, if so, what the extent of that interest is. Not surprisingly, most judges simply ignore the important safeguard that they must find the defendant had an interest in the property.* Rule 32.2(c)(2) provides that the 'defendant may not object to entry of the final order on the ground that the property belongs in whole or in part to a codefendant or third party.' As a practical matter, then, the only party that can assist the court in determining whether the defendant had an interest in the property is the government; and the government is all too happy to ignore the requirement that the court find that the defendant had an interest in the property.

2 D. Smith, *Prosecution and Defense of Forfeiture Proceedings* ¶ 14.08[2][a], at 14-109 (2009).

Thus, proceedings on claims filed under 21 U.S.C. § 853(n) are not just a part of the forfeiture proceedings; they are, in a very real sense, the forfeiture proceedings themselves. There usually is no reason why a criminal defendant would not agree to

forfeiture of property in which he has no interest, if that is what is sought by the Government. This is exactly what the criminal defendant acquiesced to here. Pursuant to a Plea Agreement, Maria Nolasco entered into a Consent Judgment providing for "the forfeiture of the bank accounts seized from her" even though those accounts were maintained *at a bank* and were titled to and owned by the petitioners, not Nolasco. Pet. App. 40-41, 44-45. The District Court did not hold a hearing or receive any evidence to determine whether Nolasco had any interest in the property.[3]

The issue whether property owners prevailing in *in personam* forfeiture cases are entitled to attorneys' fees and interest under 28 U.S.C. § 2465(b)(1) has received disparate treatment and inconsistent rulings in the lower courts, amplifying the need for this Court to accept this case for review. For example, in *United States v. Moser*, 586 F.3d at 1095, the Eighth Circuit concluded that "it is not entirely clear when we may characterize the forfeiture of property complete – after the extermination of the criminal defendant's rights (in which case the § 853(n) proceedings would not be 'proceedings to forfeit property') or after the

[3] In fact, the Government never even alleged Nolasco had an interest in the seized funds, a defect only noted by the District Court when it was considering the petitions filed by the owners under 21 U.S.C. § 853(n). Nonetheless, the District Court allowed the Government to retain all funds seized from account holders who did not file petitions to recover their property. Pet. App. 55-57.

government secures clear title." Citing "the lack of a clear answer in the statutory text" and "strong arguments to support both positions as to whether a § 853(n) proceeding qualifies as 'any civil proceeding to forfeit property under any provision of Federal law,'" the Eighth Circuit in *Moser sua sponte* fell back on general principles of sovereign immunity to conclude that "we cannot say that Congress clearly and unequivocally waived sovereign immunity in this situation." *Id.*

A different analysis was used and a contrary result reached in *United States v. D'Esclavelles*, 541 F. Supp. 2d 794, 769 (E.D. Va. 2008), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009). The District Court there conducted a thorough review and analysis of 28 U.S.C. § 2465 and the other forfeiture law amendments made in CAFRA and concluded that Congress intended to grant attorneys' fees to parties prevailing in proceedings held under 21 U.S.C. § 853(n). The Court found that "[b]ecause the purpose of the § 853(n) proceeding is to determine if the claimant's property is subject to government forfeiture, it is literally a 'civil proceeding to forfeit property under [a] provision of Federal law' as described in § 2465(b)(1)."

The Court in *D'Esclavelles* noted that its interpretation of § 2465(b)(1) was not only supported by the statute's plain language but also by language used elsewhere in CAFRA. The phrase in 28 U.S.C. § 2465(b)(1) – "any civil proceeding to forfeit

property" – appears only once in CAFRA, in § 2465(b)(1), the very provision at issue. In numerous other sections of CAFRA the phrase "civil forfeiture proceeding" was used. The Court found that Congress's decision to use distinct terminology in CAFRA's attorneys' fees provision, § 2465(b)(1), "strongly suggests that the phrase 'civil proceeding to forfeit property' is not interchangeable with 'civil in rem forfeiture proceeding,'" as the Government contends. 541 F. Supp. 2d at 797.

The Court in *D'Esclavelles* further explained that the applicability of § 2465(b)(1) turns on the "status of the claimant and the nature of the proceeding for which attorneys' fees are sought, not on how the government chose to initiate the seizure – thus the phrase '*under any provision* of Federal law.'" (emphasis in original). The court concluded that it made no difference that the petitioner's funds were seized in connection with a criminal forfeiture, because

> Petitioner was not a party to those proceedings and has not been accused of any criminal activity. It was only after the conclusion of the criminal forfeiture that Petitioner filed a petition, pursuant to 21 U.S.C. § 853(n), to recover the funds he invested in a proposed film production. As the hearing that followed was a "civil proceeding to forfeit property under [a] provision of Federal law," and Petitioner substantially prevailed, the government is liable for his attorneys' fees under the plain

> language of the statute. 28 U.S.C. § 2465(b)(1)(A).

*United States v. D'Esclavelles*, 541 F. Supp. 2d at 796. The analysis of the *D'Esclavelles* Court is cited with approval by the leading commentator. *See* D. Smith, 1 *Prosecution and Defense of Forfeiture Proceedings* ¶ 10.08, at 10-102.38(4) (2009).[4]

A contrary result was reached by a district court in *United States v. Gardiner*, 512 F. Supp. 2d 1270 (S.D. Fla. 2007). There, the Court declined an application for fees made under 28 U.S.C. § 2465 by a party which had filed a successful petition in *in personam* forfeiture proceedings conducted under 21 U.S.C. § 853. The Court held that the right to recover fees existed only in *in rem* forfeiture cases, but provided no analysis of the issue.

The importance of the right of private parties aggrieved by the unlawful seizure of their property by the Government in forfeiture proceedings to recover attorneys' fees, costs, and interest cannot be understated. Many if not most private parties cannot afford the extraordinary cost of hiring private counsel to challenge the Government to contest the seizure of their property. Aggrieved parties might be forced to accede to an unlawful seizure, even where it is clear

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[4] The Fourth Circuit's reversal in *D'Esclavelles* was on the ground that the claimant there should not have prevailed on his claim and thus he did not qualify for an award of attorneys' fees. The Court declined any further consideration of the fee issue.

the Government is acting unlawfully. This was the case for many parties whose funds were unlawfully seized by the Government here.

The Government is an intimidating adversary with unlimited resources. Even here, where millions of dollars belonging to parties not charged with any crime were unlawfully seized by the Government in a blatant misuse of a forfeiture action, many owners chose to say and do nothing. Those who had the temerity to challenge the Government have faced a withering counterattack and seemingly endless litigation in a variety of courts and jurisdictions. What if the amounts taken were not so large? Who could afford to take on the Government, or locate counsel willing to work on a contingent fee basis, if there were no right to recover fees?

Congress understood this when it enacted CAFRA forfeiture reform legislation in 2000. *See United States v. Certain Real Property*, 579 F.3d 1315, 1322-1323 (11th Cir. 2009) (CAFRA was intended to make forfeiture procedures "fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful Government seizures") (quoting H.R. Rep. No. 106-192 at 11 (1999)).

Under the holding of the Court of Appeals here, prevailing property owners in forfeiture cases that the Government elected to file on an *in personam* basis have no right to recover interest or recover attorneys' fees on their seized funds. They might, it is

true, try to recover fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. But this is quite a different thing. A fee award under EAJA is not specifically applicable to forfeiture proceedings, is not mandatory, is limited to cases where the Government's position is found not to be "substantially justified," applies only to parties meeting strict financial requirements, and fees of counsel are capped at modest statutory rates.

Parties who prevail on claims to recover their property in forfeiture cases *are entitled* under 28 U.S.C. § 2465(b)(1) to recover their attorneys' fees without regard to their net worth and without any cap on rates of counsel and without regard to the grounds for the Government's position. We can reasonably surmise that Congress did not graft on EAJA's various limitations to the remedy it created in 28 U.S.C. § 2465(b)(1) because a party who is forced to sue to recover property illegally seized by the Government is fundamentally different than a litigant who simply prevails against the Government in garden variety civil litigation to which EAJA generally applies.

Could Congress have intended that innocent property owners who prevail and recover their illegally seized property in an *in personam* forfeiture proceeding *might* only recover fees if they can satisfy all of EAJA's requirements while property owners who prevail and recover their property in *in rem* forfeiture cases are *entitled* to recover all their fees, costs, and interest under 28 U.S.C. § 2465(b)? The

cost of recovering one's own property illegally seized by the Government in forfeiture cases is no different whether the owner prevails in an *in rem* or an *in personam* forfeiture case ancillary to a criminal prosecution of another party. The wrong perpetrated on a property owner is the same regardless of the form in which the Government chose to pursue forfeiture. Congress's clear intent that citizens whose funds have been wrongfully seized in a forfeiture case be made whole should obtain under either scenario.

In sum, there is no indication that Congress intended to treat property owners who successfully recover their property differently depending upon the type of forfeiture case the Government chose to bring. Congress's inclusion of broad, open-ended language in 28 U.S.C. § 2465(b)(1) indicates claimants in both types of forfeiture cases are entitled to recover fees. There is no valid reason why Congress would have desired disparate treatment of innocent property owners in the two types of forfeiture proceedings. This Court should review this case to clarify that property owners who prevail in forfeiture proceedings governed by 21 U.S.C. § 853(n) are entitled under 28 U.S.C. § 2465(b)(1) to be made whole.

## CONCLUSION

Wherefore, the petition for a writ of *certiorari* should be granted.

Dated: New York, New York

Respectfully submitted,

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*Attorneys for Petitioners*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 08-4664

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UNITED STATES OF AMERICA

v.

MARIA CAROLINA NOLASCO.

FARSWISS ASSET MANAGEMENT LTD.; HARBER CORPORATION; MABON CORPORATION; GATEX CORPORATION; PIEDADE PEDRO ALMEIDA; AVION RESOURCES LTD.; FARES BAPTISTA PINTO; JOSE BAPTISTA PINTO NETO; TIGRUS CORPORATION; POMPEU COSTA LIMA PINHEIRO MAIA; ISABEL CRISTINA DUTRA PINHEIRO MAIA,
Appellants.
Appellants pursuant to F.R.A.P. 12(a)

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UNITED STATES OF AMERICA

v.

MARIA CAROLINA NOLASCO

MIDLAND FINANCIAL, INC.,
Appellant.
(Pursuant to Fed.R.App.P. 12(a))

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 04-cr-00617-001)
District Judge: Honorable Joseph A. Greenaway

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Submitted Under Third Circuit LAR 34.1(a)
November 18, 2009

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Before: RENDELL, BARRY and CHAGARES,
*Circuit Judges*

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JUDGMENT

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This cause came to be heard on appeal from the District Court for the District of New Jersey and was submitted on November 18, 2009.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the order of the District Court be and hereby is affirmed. Costs taxed against appellants. All in accordance with the Opinion of the Court.

ATTEST

/s/ Marcia M. Waldron
Clerk

Dated: December 4, 2009

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**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 08-4664

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FARSWISS ASSET MANAGEMENT LTD.; HARBER CORPORATION; MABON CORPORATION; GATEX CORPORATION; PIEDADE PEDRO ALMEIDA; AVION RESOURCES LTD.; FARES BAPTISTA PINTO; JOSE BAPTISTA PINTO NETO; TIGRUS CORPORATION; POMPEU COSTA LIMA PINHEIRO MAIA; ISABEL CRISTINA DUTRA PINHEIRO MAIA,
Appellants.
Appellants pursuant to F.R.A.P. 12(a)

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No. 08-4872

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UNITED STATES OF AMERICA

v.

MARIA CAROLINA NOLASCO

MIDLAND FINANCIAL, INC.,
Appellant.
(Pursuant to Fed.R.App.P. 12(a))

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
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Submitted Under Third Circuit LAR 34.1(a)
November 18, 2009

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Before: RENDELL, BARRY and CHAGARES,
*Circuit Judges*

(Opinion Filed: December 4, 2009)

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OPINION

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BARRY, Circuit *Judge*

This appeal is taken from a November 12, 2008 order of the District Court denying appellants' application for attorneys' fees pursuant to 28 U.S.C. § 2465(b) ("Section 2465(b)"). We will affirm.

I.

Because we write solely for the parties' benefit, we set forth only those facts necessary to our analysis.

In June 2002, the Government seized more than three dozen bank accounts at Merchants Bank (now Valley National Bank) containing more than $21 million. The funds were seized in connection with the arrest of Maria Carolina Nolasco, a bank employee, on tax evasion and other charges. Two years later, Nolasco pled guilty to one count of operating a money transmitting business without a license, in violation of 18 U.S.C. § 1960, and four counts of filing false tax returns, in violation of 26 U.S.C. § 7201.

In December 2004, the Government commenced criminal *in personam* forfeiture proceedings against Nolasco pursuant to 18 U.S.C. § 982(a) and Federal Rule of Criminal Procedure 32.2, and the District Court filed a preliminary order of forfeiture. Twenty-four claimants, including appellants, then filed petitions under 21 U.S.C. § 853(n) ("Section 853(n)") asserting title superior to Nolasco in the funds.[1]

In June 2006, the District Court granted the Section 853(n) claimants' motion for summary judgment and amended the preliminary order of forfeiture. In so doing, the Court found appellants' interests superior to Nolasco's because the Government offered

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[1] Two of the twenty-four petitions were dismissed.

no evidence that Nolasco held any right, title, or interest in the property. According to the Court, "the Government [sought] to transform this criminal forfeiture proceeding into a tool for investigation of Brazilian crime and international financial wrongdoing. Were this Court to comply, it would far exceed the bounds of the role assigned to it by the criminal forfeiture statutes." (A70.)[2]

Based on the order granting summary judgment, appellants sought attorneys' fees, costs, and interest under Section 2465(b) as claimants who "substantially prevail[ed]" in a "civil proceeding to forfeit property." In the alternative, appellants sought an award of interest from the United States. The District Court rejected those requests.

We have jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291.

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[2] The funds became the subject of a torturous procedural labyrinth involving the Manhattan District Attorney's Office, New York state courts, the United States District Court for the District of Columbia, Brazilian courts, and a Mutual Legal Assistance Treaty. Those proceedings, however, are not germane to this appeal. Suffice it to say that the funds have either been forfeited by appellants or are in the custody of the U.S. Department of Justice.

## II.

### A.

Our review of legal questions, including questions of statutory interpretation, is plenary. *United States v. Dees*, 467 F.3d 847, 851 (3d Cir. 2006), *cert. denied*, 128 S. Ct. 52 (2007). When interpreting a statute, "we need to 'discern legislative intent,' considering first the plain meaning of the statutory text. . . . The plain meaning of the text should be conclusive, except in the rare instance when the court determines that the plain meaning is ambiguous." *Lawrence v. City of Phila.*, 527 F.3d 299, 316-17 (3d Cir.) (internal citations omitted), *cert. denied*, 129 S. Ct. 763 (2008).

### B.

In analyzing whether appellants are entitled to attorneys' fees, costs, and interest under Section 2465(b), we will first place the underlying Section 853(n) proceedings in context. We will then address the elements of a claim under Section 2465(b) and analyze those elements in the context of an underlying Section 853(n) proceeding.

#### i.

When an *in personam* criminal forfeiture prosecution is initiated, a third party is barred from intervening in the criminal case and from commencing an action against the United States concerning the

validity of an alleged property interest. 21 U.S.C. § 853(k). A third party's property interest, however, may be vindicated by means of Section 853(n). Therefore, following a finding of forfeitability and the entry of a preliminary order of forfeiture, a third party may assert an interest in forfeited property by petitioning the court for an ancillary proceeding in which to adjudicate the validity of that property interest. 21 U.S.C. § 853(n)(2). That proceeding "is the only avenue by which a third-party claimant may seek to assert an interest in property that has been included in an indictment." *United States v. Puig*, 419 F.3d 700, 703 (8th Cir. 2005).

To prevail at a Section 853(n) ancillary proceeding, a claimant must demonstrate a vested legal right, title, or interest in the property superior to the defendant's or that the claimant is a *bona fide* purchaser for value of the property interest. 21 U.S.C. § 853(n)(6)(A)-(B). In short, where "a third party's interest in the forfeited property, at the time of the criminal acts, [is] superior to the criminal defendant's interest, then the interest that the government acquires when it steps into the defendant's shoes is subordinate to that of the third party." *United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991).

Should a claimant demonstrate a property interest superior to the defendant's, the court will amend the order of forfeiture accordingly, 21 U.S.C. § 853(n)(6), and, on disposition of all petitions filed under Section 853(n), may enter a final order of forfeiture, *see* 21 U.S.C. § 853(n)(7).

ii.

Enacted as part of the Civil Asset Forfeiture Reform Act ("CAFRA"), Section 2465(b) provides that a claimant who "substantially prevails" in "any civil proceeding to forfeit property under any provision of Federal law" may recover from the United States reasonable attorneys' fees, costs, post-judgment interest, and, in some instances, actual or imputed prejudgment interest. 28 U.S.C. § 2465(b)(1)(A)-(C).

Thus, for a third-party Section 853(n) claimant to recover attorneys' fees, costs, and interest under Section 2465(b), the claimant must establish that he or she: (1) substantially prevailed; (2) in a civil proceeding; (3) to forfeit property. If one of those elements is not satisfied, a claimant is not entitled to the benefits of Section 2465(b).

a.

In *United States v. Lavin,* in determining the timeliness of an appeal, we stated "that a proceeding under 21 U.S.C. § 853(n) . . . is a 'civil case' for purposes of [Federal Rule of Appellate Procedure 4(a)(1)]." 942 F.2d at 182. We relied on the principle that civil cases are, broadly, any actions that are not criminal prosecutions. *Id.* at 181 (citing 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* para 204.08[1], at 4-29 (2d ed. 1991)). We further noted that proceedings related to criminal prosecutions, such as habeas corpus petitions and actions dealing with bail bonds, are civil in nature, despite their

relationship to a prosecution. Section 853(n) ancillary proceedings are not part of the criminal prosecution. *See* Fed. R. Crim. P. 32.2(c)(4).

*Lavin* is consistent with the great weight of authority. *See United States v. Pease,* 331 F.3d 809, 816 (11th Cir. 2003) (finding that Section 853(n) ancillary proceedings are civil); *United States v. Gilbert,* 244 F.3d 888, 906-08 (11th Cir. 2001) (finding Section 853(n) civil for purposes of appellate jurisdiction); *United States v. Alcaraz-Garcia,* 79 F.3d 769, 772 n.4 (9th Cir. 1996) (following *Lavin* approach to timeliness of appeal); *United States v. Douglas,* 55 F.3d 584, 585 (11th Cir. 1995) (holding that Section 853(n) proceeding is civil action under Equal Access to Justice Act); *see also David B. Smith,* Prosecution and Defense of Forfeiture Cases § 14.08[2][c], at 14-117 (2009 ed.) ("[T]he ancillary hearing procedure is civil in nature.").[3]

Therefore, because a Section 853(n) proceeding is separate and distinct from the prosecution itself, Section 853(n) ancillary proceedings are "civil" proceedings for purposes of Section 2465(b).

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[3] *But see United States v. Yerardi,* 192 F.3d 14, 19 (1st Cir. 1999) (ancillary proceeding is criminal in nature for purposes of adverse spousal testimony privilege); *United States v. Gardiner,* 512 F. Supp. 2d 1270, 1272 (S.D. Fla. 2007) (finding Section 853(n) proceeding criminal and, thereby, not covered by Section 2465(b)'s fee-shifting provision).

b.

The Government contends that Section 853(n) ancillary proceedings are not proceedings "to forfeit property," but rather are proceedings to quiet title and, accordingly, are not subject to Section 2465(b). We agree.

Other courts have analogized Section 853(n) proceedings to "quiet title" proceedings. For example, in deciding that a Section 853(n) third-party claimant did not have a right to a jury trial, the Fourth Circuit concluded that Section 853(n) proceedings are "most analogous to an equitable petition to quiet title." *United States v. McHan*, 345 F.3d 262, 275 (4th Cir. 2003). According to the court, "[l]ike a § 853(n) proceeding, the purpose of a quiet title action is 'to determine which named party has superior claim to a certain piece of property.'" *Id.* (quoting *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993)). Although the court acknowledged differences between the proceedings, because "the relief offered to a complainant in a quiet title action is substantially the same relief offered to a § 853(n) petitioner," it concluded that the claimant was not entitled to a jury trial. *Id.*; *cf. Gilbert*, 244 F.3d at 911 & n.47 (observing that ancillary hearing to litigate third party's property rights under analogous RICO statute "is essentially a quiet title proceeding"). Stated somewhat differently, a Section 853(n) proceeding cannot result in the forfeiture of a claimant's property. Rather, the Section 853(n) proceeding merely ensures that property belonging to a third-party claimant is

not inadvertently forfeited as part of a criminal defendant's property.

Ownership is the only relevant issue in a Section 853(n) ancillary proceeding. *See, e.g. United States v. Soreide*, 461 F.3d 1351, 1354 (11th Cir. 2006) ("Unlike the civil forfeiture statutes, the criminal forfeiture statutes contain no provision for an 'innocent owner' defense for third parties."). Forfeitability has already been proven, and proof of ownership in a Section 853(n) proceeding is a complete defense. *United States v. Andrews*, 530 F.3d 1232, 1236-37 (10th Cir. 2008) ("[A] third party has no right to challenge the preliminary order's finding of forfeitability; rather the third party is given an opportunity during the ancillary proceeding to assert any ownership interest that would require amendment of the order."). That difference demonstrates that Section 853(n) ancillary proceedings exclude property from forfeiture and do not "forfeit property" as required by Section 2465(b).

Appellants contend that viewing Section 853(n) ancillary proceedings as quiet title proceedings is too narrow. That argument misses the mark. If a Section 853(n) proceeding is viewed broadly as a proceeding "to forfeit property," then it should be viewed in context, i.e. it should be viewed as part and parcel of the larger *criminal* forfeiture proceeding. Indeed, before noting that the Federal Rules of Civil Procedure would apply in many respects to Section 853(n) proceedings, the Advisory Committee declined to adopt the Civil Rules in full "[b]ecause an ancillary hearing is *connected to a criminal case*." Fed. R. Crim. P. 32.2,

Advisory Committee Notes on 2000 Amendment (emphasis added). Therefore, although civil in nature, because a Section 853(n) proceeding remains under the larger *criminal* forfeiture umbrella, application of Section 2465(b) would frustrate Congress' intent to reform *civil* forfeiture proceedings. *See, e.g.*, H.R. Rep. No. 106-192, *available at* 1999 WL 406892, at *2 (noting that CAFRA "would create general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized").

Our holding is consistent with *United States v. Huynh*, No. 08-20541, 2009 WL 1685139 (5th Cir. June 16, 2009) (unpublished), *cert. denied*, 2009 WL 2969482 (2009), which addressed an analogous issue. There, plaintiffs, who, pursuant to a proceeding under 18 U.S.C. § 983(e), set aside the forfeiture of property, sought attorneys' fees as substantially prevailing parties under CAFRA. According to the court, however, Section 2465(b) "applies only to civil proceedings '*to forfeit* property,' that is, civil forfeiture actions initiated by the Government." *Id.* at *1. Because "[p]laintiffs' claim . . . [sought] to *set aside* a forfeiture that ha[d] already occurred," the court declined to award attorneys' fees. *Id.*[4]

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[4] The only court to find Section 853(n) claimants eligible for attorneys' fees pursuant to Section 2465(b) is the Eastern District of Virginia in *United States v. D'Esclavelles*, 541 F. Supp. 2d 794 (E.D. Va. 2008). That case, however, was reversed on other

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Similarly, because a Section 853(n) ancillary proceeding is not a proceeding "to forfeit property," appellants are not entitled to attorneys' fees, costs, or interest pursuant to Section 2465(b).[5]

Our holding also comports with the Eighth Circuit's reasoning in *United States v. Moser,* the only court of appeals to address this issue. No. 08-2909, ___ F.3d ___, 2009 WL 3837292 (8th Cir. Nov. 18, 2009) (holding that successful claimant in Section 853(n) ancillary proceeding may not recover attorneys' fees under Section 2465(b), in part due to government's persuasive argument that Section 853(n) proceeding is akin to quiet title action).

C.

Finally, we address whether appellants are entitled to an award of interest from the United States.

In *Library of Congress v. Shaw,* the Supreme Court enumerated the "no-interest rule," holding that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." 478 U.S. 310, 314 (1986);

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grounds. *United States v. Buk,* 314 F. App'x 565 (4th Cir. 2009). The Fourth Circuit did not address the issue.

[5] Because we hold that Section 853(n) proceedings are not proceedings "to forfeit property" and therefore not subject to CAFRA's attorneys' fee provisions, we need not address whether appellants substantially prevailed.

*accord Larson v. United States*, 274 F.3d 643, 647-48 (1st Cir. 2001); *United States v. $30,0006.25* [sic] *in U.S. Currency*, 236 F.3d 610, 613-14 (10th Cir. 2000); *United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843, 844-45 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998).

In the context of seized funds, however, the Sixth, Ninth, and Eleventh Circuits permit claims of interest to proceed against the United States. *See, e.g., United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998). The leading minority case is *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995). There, the court found that because the interest on seized funds "bec[a]me part of the *res*," it should "be returned with the *res* to the claimant." *Id.* at 1496. According to the court, that result did not require the United States "to pay for damage it has done," but rather to "disgorge benefits that it has actually and calculably received from an asset that it has been holding improperly." *Id.* at 1498; *see also id.* at 1494 (observing that "in any normal commercial dispute over property, the disputed property would, as soon as practical, be placed in an escrow account to earn interest that would go to whoever was the ultimate winner"). A later Ninth Circuit opinion, *Carvajal v. United States*, observed that the minority view was consistent with Congress' intent in passing CAFRA, a statute that "ratified the outcome, if not the

rationale" of the minority perspective. 521 F.3d 1242, 1248-49 (9th Cir. 2008) (quotation omitted).

The minority view, however, is at odds with *Shaw*. First, *Shaw* explicitly noted that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 319. Thus, whether labeled as damages, loss, earned increment, just compensation, discount, offset, penalty or any other term, the no-interest rule remains applicable. In other words, interest by any other name is still interest.

Second, *Shaw* left no doubt that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." 478 U.S. at 321; *see also Larson*, 274 F.3d at 647 ("[N]either fairness considerations nor rules applicable to private disputes can alone provide grounds for abrogating sovereign immunity."). Thus, the minority view expressed in *$277,000 in U.S. Currency* (finding private transactions instructive) and *Carvajal* (relying on CAFRA's legislative history) is in conflict with *Shaw*.

We choose to follow the majority approach and hew to the letter of *Shaw* by holding that, in the absence of express congressional consent to the contrary, the United States is immune from an award of interest. Appellants point to no governing statute entitling them to interest. Therefore, appellants may not recover interest against the United States.

## III.

For the reasons stated above, we will affirm the order of the District Court.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | Civil Action No. 04-617 (JAG) |
| v. | : | |
| MARIA CAROLINA NOLASCO, | : | **ORDER AMENDED** |
| Defendant. | : | |

**GREENAWAY, JR., U.S.D.J.**

This matter comes before this Court on the motions for attorneys' fees and interest, pursuant to 28 U.S.C. § 2465(b)(1), by Moving Petitioners;[1] and it appearing that this Court has reviewed the parties' submissions, and for the reasons set forth in the accompanying Opinion, and good cause appearing,

[1] The movants include: (1) Piedade Pedro de Almeida; (2) Harber Corporation; (3) Gatex Corporation; (4) Mabon Corporation; (5) Farswiss Asset Management Ltd.; (6) Armando Pereira Reis and Jose Moacir Guimaraes; (7) Bahia Blanca Ltd.; (8) Beverly Hills Group, Inc.; (9) Bradner Investments S.A.; (10) Chettiar Business, Inc.; (11) Fausto L. Guimaraes and Helder J.S.F. Taveira; (12) Harborside Corporation; (13) Phoenix Export Import S.A.; (14) Safe Port Investment Corporation; (15) Silver Commodities Ltd.; (16) Midland Financial, Inc.; (17) Avion Resources, Ltd.; (18) Tigrus Corporation; (19) Fares Baptista Pinto; (20) Jose Baptista Pinto Neto; (21) Pompeu Costa Lima Pinheiro Maia; and (22) Isabel Cristina Durta Pinheiro. The movants shall be collectively referred to as the "Moving Petitioners."

IT IS on this 12th day of November, 2008,

ORDERED that Moving Petitioners' motion for attorneys' fees and interest (Docket Entries No. 165-178, 183) is DENIED; and it is further

ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of entry of this Order.

S/Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | Criminal Action No. 04-617 (JAG) |
| v. | : | |
| MARIA CAROLINA NOLASCO, | : | **OPINION AMENDED** |
| Defendant. | : | |

**GREENAWAY, JR., U.S.D.J.**

This matter comes before this Court on the motions for attorneys' fees and interest, pursuant to 28 U.S.C. § 2465(b)(1), by Moving Petitioners.[1] For the reasons set forth below, this motion shall be denied.

[1] The movants include: (1) Piedade Pedro de Almeida; (2) Harber Corporation; (3) Gatex Corporation; (4) Mabon Corporation; (5) Farswiss Asset Management Ltd.; (6) Armando Pereira Reis and Jose Moacir Guimaraes; (7) Bahia Blanca Ltd.; (8) Beverly Hills Group, Inc.; (9) Bradner Investments S.A.; (10) Chettiar Business, Inc.; (11) Fausto L. Guimaraes and Helder J.S.F. Taveira; (12) Harborside Corporation; (13) Phoenix Export Import S.A.; (14) Safe Port Investment Corporation; (15) Silver Commodities Ltd.; (16) Avion Resources, Ltd.; (17) Tigrus Corporation; (18) Fares Baptista Pinto; (19) Jose Baptista Pinto Neto; (20) Pompeu Costa Lima Pinheiro Maia; and (21) Isabel Cristina Durta Pinheiro.

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## I. BACKGROUND

Defendant Maria Nolasco ("Nolasco") was employed by Valley National Bank, where she managed a number of bank accounts. On June 27, 2002, she was arrested and later charged with, inter alia, filing false tax returns and operating a money transmitting business without a license, pursuant to 18 U.S.C. § 1960. At the same time, the United States of America (the "Government") seized over twenty-one million dollars held in approximately thirty-nine different bank accounts that Nolasco managed.

On October 4, 2004, Nolasco pled guilty to tax evasion and operating an illegal money transmission business, and agreed to forfeit whatever interest she may have had in the seized funds. The Government

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On June 20, 2008, petitioner Midland Financial, Inc. ("Midland") filed a letter requesting leave to join in the applications for an award of interest, attorneys' fees and expenses. Despite the untimeliness of its request, Midland shall be granted leave to join in this motion. Midland, together with the aforementioned movants, shall be collectively referred to as the "Moving Petitioners."

On May 12, 2008, James McCarney, Esq. filed a letter requesting to join the Moving Petitioners' applications for attorneys' fees and interest. The letter was filed on behalf of "petitioners Avion Resources Ltd., Elza Xerfan Haber, Gustavo Xerfan Haber, Meg Luna Soares Haber, Michel Homci Haber, Tigrus Corporation, Pompeu Costa Lima Pinheiro Maia, Isabel Cristina Durta Pinheiro Maia, Jose Baptista Pinto Neto and Fares Baptista Pinto." At the hearing held before this Court on September 3, 2008, however, this letter-request was withdrawn – as to Elza Xerfan Haber, Gustavo Xerfan Haber, Meg Luna Soares Haber and Michel Homci Haber.

commenced criminal forfeiture proceedings, pursuant to 18 U.S.C. § 982. On December 13, 2004, in accordance with a plea agreement, this Court entered a Consent Judgment and Preliminary Order of Forfeiture. Following publication of notice, petitions challenging the forfeiture were timely filed with this Court. The petitioners ultimately filed motions seeking summary judgment.

In an Opinion dated June 6, 2006, this Court held that the petitioners have proven, by a preponderance of the evidence, "that their right, title, or interest in the forfeited property is superior to that of Nolasco," pursuant to 21 U.S.C. § 853(n).[2] (Docket

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[2] 21 U.S.C. § 853, which applies to criminal forfeitures, states –

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

§ 853(n)(2). To describe the hearing process, the statute provides,

> At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented

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Entry No. 153-2.) Accordingly, on June 8, 2006, this Court filed an Order amending the Preliminary Order of Forfeiture (Docket Entry No. 154). On June 28, 2006, this Court entered an Order directing the Government to return Petitioners' seized property.

On May 12, 2008, Moving Petitioners filed the instant motions requesting that this Court award attorneys' fees and interest, pursuant to 28 U.S.C. § 2465(b).

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> at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

§ 853(n)(5). The statute goes on to explain that the district court must amend the order of forfeiture if it finds,

> based on a preponderance of the evidence that –
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section. . . .

§ 853(n)(6).

## II. ANALYSIS

Moving Petitioners request this Court to award to them attorneys' fees and interest, pursuant to 28 U.S.C. § 2465(b)(1) of the Civil Asset Forfeiture Reform Act (the "CAFRA"), which states:

> (b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for
>
> (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
>
> (B) post judgment interest, as set forth in section 1961 of this title; and
>
> (C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale
>
> —
>
> (i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and
>
> (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no

> interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

28 U.S.C. § 2465(b)(1).

In order to determine whether Moving Petitioners are entitled to receive relief under the CAFRA, this Court must determine whether this action fits under the heading of "any civil proceeding to forfeit property under any provision of Federal law . . . ," as set forth in § 2465(b). Moving Petitioners argue that the petitions they filed in 2005, pursuant to § 853(n), are "civil in nature," and therefore constitute a civil proceeding to forfeit property. In contrast, the Government argues, and this Court agrees, that Moving Petitioners cannot recover attorneys' fees and interest under § 2465(b)(1) because the petitions were filed ancillary to a criminal case, and therefore do not constitute civil proceedings to forfeit property.

In order for Section 2465(b) to apply, two conditions must be met: first, the action must constitute a "civil proceeding," and second, the proceeding must be one "to forfeit property." Moving Petitioners argue that they are entitled to attorneys' fees as well as

interest under § 2465(b) because their § 853(n) petitions constitute "civil proceedings" under the CAFRA. To buttress this argument, Moving Petitioners rely heavily on an opinion issued just months ago from the United States District Court for the Eastern District of Virginia, in *United States v. D'Esclavelles*, 541 F. Supp. 2d 794 (E.D. Va. 2008). In that case, the court held that a third-party claimant's Section 853(n) petition constituted a "civil proceeding to forfeit property" under § 2465(b)(1). 541 F. Supp. 2d at 798. The court explained that Congress purposefully drafted the language of § 2465(b)(1) in a broad manner so as to incorporate more than just civil forfeiture proceedings. *Id.* at 797.

The court went on to explain that § 2465(b)(1) could not have been intended to apply only to forfeitures brought pursuant to a civil forfeiture statute. According to the court, the "applicability of the attorneys' fees provision of CAFRA turns on the status of the claimant and the nature of the proceeding for which attorneys' fees are sought, not on how the government chose to initiate the seizure – thus the phrase '*under any provision* of Federal law.'" *Id.* (emphasis in original). "While Congress clearly did not intend to provide attorneys' fees for *defendants* to criminal forfeiture proceedings," the court found, "[t]here is simply nothing in the language of § 2465(b)(1) that conditions eligibility on how the government chose to seize the property." *Id.*

Moving Petitioners correctly characterize their 853(n) petitions as "civil." Courts have referred to

§ 853(n) proceedings as "civil in nature," and permit application of civil procedural rules. *See United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991) (holding that, under FED. R. APP. P. 4, petitioner had sixty days to appeal the district court's decision, as opposed to the ten-day time limit applied in criminal cases, because his § 853(n) petition is civil in nature); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996) (same); *United States v. McCollum*, 443 F. Supp. 2d 1154, 1165 (D. Neb. 2006) ("Although this is a criminal case, the matter before me is quasi-civil in nature and arises pursuant to 21 U.S.C. § 853(n) (criminal forfeiture and third-party interests)."); *United States v. Wade*, 291 F. Supp. 2d 1314, 1316-17 (M.D. Fla. 2003) (holding that petitioner is not entitled to appointment of counsel because § 853(n) petitions are civil in nature).

However, Moving Petitioners' argument, and the court's holding in *D'Esclavelles*, do not explain how a Section 853(n) petition satisfies the second condition expressed in § 2465(b), that the proceeding must be one "to forfeit property." The proceeding to forfeit property unequivocally refers to the *criminal* forfeiture proceeding brought against Nolasco. The § 853(n) petitions filed by Moving Petitioners were ancillary to this criminal forfeiture action, and, while civil in nature, did not purport to forfeit property. Instead, the § 853(n) petitions served as an attempt to intervene in and block the Government's attempt to seize the property in the criminal forfeiture proceeding it initiated. In short, neither the forfeiture proceedings

commenced by the Government, nor the Moving Petitioners' § 853(n) petitions constitute a "*civil* proceeding *to forfeit property*."[3]

The legislative history of the CAFRA also serves to support the proposition that § 2465(b) was only intended to apply to civil forfeiture proceedings. A report from the House of Representatives indicates that, in its version of the bill, the House wanted to permit the appointment of counsel to third-party claimants, explaining "civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances." H.R. REP. NO. 106-192, at 14 (1999).

The Senate, however, revised the bill to only allow the appointment of counsel in two discrete situations. First, courts could authorize counsel to represent

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[3] A decision rendered by the United States District Court for the Southern District of Florida in *United States v. Gardiner*, 512 F. Supp. 2d 1270 (S.D. Fla. 2007), supports this position. In *Gardiner*, a petitioner successfully argued, pursuant to 21 U.S.C. § 853(n), that it was entitled to recover property seized in a criminal forfeiture proceeding. 512 F. Supp. 2d at 1271. The petitioner then sought to recover attorney's fees and costs under CAFRA. *Id.* The court distinguished the case before it, a "criminal forfeiture proceeding," from "a civil *in rem* forfeiture proceeding" to hold that 28 U.S.C. § 2465(b) was not applicable. *Id.* at 1272. The court cited language in § 2465(b) stating that the provision "applies 'in **any civil proceeding** to forfeit property under any provision of Federal law,'" then explained that "the attorney's fee provision in subsection (b) is applicable only in civil forfeiture proceedings." *Id.* (emphasis in original).

an indigent claimant "if the claimant is already represented by court-appointed counsel in connection with a related federal criminal case." 106 CONG. REC. S1761 (Mar. 27, 2000) (statement of S. Leahy). Second, counsel would be appointed to indigent claimants if the government sought to forfeit their primary residence. *Id.* In all other circumstances, while the appointment of counsel shall not be permitted, claimants may recover "reasonable attorney fees and costs if they substantially prevail on their claim." *Id.* This revision demonstrates that Section 2465(b) was intended by Congress as a way to address the punitive nature of *civil* forfeiture proceedings, without requiring the appointment of counsel.

Having found that § 2465(b) is not available as a basis upon which to award interest and attorneys' fees to Moving Petitioners, this Court next considers whether its equitable powers permit it to award interest or attorneys' fees in the absence of statutory authority. This Court finds that such circumstances do not exist in this case. The Supreme Court has held that interest cannot be recovered in a suit against the Government unless the Government has waived its sovereign immunity from such an award by contract or statute. *Library of Congress v. Shaw,* 478 U.S. 310, 314 (1986). Also, the Supreme Court has held that prevailing litigants are not entitled to collect a reasonable attorneys' fee from their opposing party, unless Congress so provides through legislation. *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240, 247 (1975). Since Moving Petitioners

have not pointed to an exception to these rules applicable in this circumstance,[4] this Court declines to award attorneys' fees or interest to Moving Petitioners on this basis.[5]

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[4] In *Alyeska*, the Court highlighted these exceptions by noting that a court may order payment of attorneys' fees in the absence of a contract or statute "for the 'willful disobedience of a court order . . . as part of the file [sic] to be levied on the defendant . . . "or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." *Alyeska*, 421 U.S. at 258. Likewise, in *Shaw*, the Supreme Court noted that the no interest rule does not apply "where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." *Shaw*, 478 U.S. at 317 n.5. However, none of these exceptions appear to be applicable here.

[5] The Government also urged this Court to find that attorneys' fees are not an appropriate award for Moving Petitioners under 28 U.S.C. § 2412(d)(1)(A). Section 2412(d)(1)(A) states that "the prevailing party in any civil action" brought against the United States may recover reasonable attorneys' fees, unless a court finds that the position of the United States was substantially justified. *See United States v. Douglas*, 55 F.3d 584, 588 (11th Cir. 1995) (holding that § 853(n) proceedings are civil actions under the Equal Access to Justice Act). The Government argues that Petitioners should not recover attorneys' fees under § 2412(d)(1)(A), for two reasons: (1) Petitioners' motion for attorneys' fees, if construed as being made pursuant to the Equal Access to Justice Act (the "EAJA"), is untimely; and (2) the United States was "substantially justified" in its position; and (3) special circumstances make such an award unjust. (Gov't Br. 20-27.) However, since Petitioners' motion for attorneys' fees and interest is expressly made pursuant to § 2465(b), this Court need not decide whether Petitioners are entitled to an award for attorneys' fees under the EAJA.

## IV. CONCLUSION

For the reasons set forth above, Moving Petitioners' motion for attorneys' fees and interest, pursuant to 28 U.S.C. § 2465(b)(1), shall be denied.

S/Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

Date: November 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 08-4664

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UNITED STATES OF AMERICA

v.

MARIA CAROLINA NOLASCO

FARSWISS ASSET MANAGEMENT LTD.; HARBER CORPORATION; MABON CORPORATION; GATEX CORPORATION; PIEDADE PEDRO ALMEIDA; AVION RESOURCES LTD; FARES BAPTISTA PINTO; JOSE BAPTISTA PINTO NETO; TIGRUS CORPORATION; POMPEU COSTA LIMA PINHEIRO MAIA; ISABEL CRISTINA DUTRA PINHEIRO MAIA,

Appellants

Appellants pursuant to F.R.A.P. 12(a).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 04-cr-00617-001)
District Judge: Honorable Joseph A. Greenaway

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**Present**: SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*

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## SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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The petition for rehearing en banc filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing en banc is DENIED.

BY THE COURT:

**/s/Maryanne Trump Barry**
Circuit Judge

Dated: February 9, 2010

tmk/cc: George S. Leone, Esq.
Steven G. Sanders, Esq.
John P. Gleason, Esq.
Bernard D'Orazio, Esq.
James G. McCarney, Esq.

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**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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|---|---|
| UNITED STATES OF AMERICA | Hon. Joseph A. Greenaway, Jr. |
| v. | Criminal No. 04-617 |
| MARIA CAROLINA NOLASCO | **OPINION** |
| | (Filed Jun. 7, 2006) |

**GREENAWAY, JR., U.S.D.J.**

This matter comes before the Court on the motions for summary judgment by Petitioners,[1] pursuant to FED. R. CRIM. P. 32.2(c) and FED. R. CIV. P. 56. Although the Petitioners initially styled these motions in different ways (e.g., motion for the return of

[1] Movants are twenty-two petitioners: (1) Armando Pereira Reis and Jose Moacir Guimaraes, (2) Avion Resources Ltd., (3) Bahia Blanca Ltd., (4) Best Consulting Ltd., (5) Beverly Hills Group, Inc., (6) Bradner Investments S.A., (7) Braza Corp., (8) Chettiar Business, Inc., (9) Fares Baptista Pinto and Jose Baptista Pinto Neto, (10) Farswiss Asset Management Ltd., (11) Fausto L. Guimaraes and Helder J.S.F. Taveira, (12) Gatex Corp., (13) Harber Corp., (14) Harborside Corp., (15) Mabon Corp., (16) Midland Financial, Inc., (17) Phoenix Export Import S.A., (18) Piedade Pedro de Almeida, (19) Pompeu Costa Maia and Isabel Cristina Dutra Pinheiro Maia, (20) Safe Port Investment Corp., (21) Silver Commodities Ltd., and (22) Tigrus Corp. (collectively, "Petitioners.") Best Consulting and Braza did not file motions, but were granted leave to join in the motions for summary judgment. (Hr'g Tr. 55, Apr. 12, 2006.)

seized funds, motion to amend the Order of Forfeiture), these motions will be construed as motions for summary judgment.[2] For the reasons set forth below, Petitioners' motions will be granted.

## BACKGROUND

Defendant Maria Nolasco ("Nolasco") was employed by Valley National Bank, where she managed a number of bank accounts. On June 27, 2002, she was arrested and later charged with, inter alia, filing false tax returns and operating a money transmitting business without a license, pursuant to 18 U.S.C. § 1960. At the same time, the United States of America (the "Government") seized over 21 million dollars held in approximately thirty-nine different bank accounts that Nolasco managed.

On October 4, 2004, the Defendant pled guilty to tax evasion and operating an illegal money transmission business, and agreed to forfeit whatever interest she may have had in the seized funds. The Government commenced criminal forfeiture proceedings, pursuant to 18 U.S.C. § 982. On December 13, 2004, in accordance with a plea agreement, this Court entered a consent judgment and a Preliminary Order of Forfeiture. Following publication of notice, twenty-four petitions challenging the forfeiture were timely filed with this Court. The Government then filed

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[2] *See* FED. R. CRIM. P. 32.2(c)(1)(B) *infra*.

twenty-four motions to dismiss the petitions for failing to meet the specific pleading requirements of 21 U.S.C. § 853(n)(3), and for failing to demonstrate that Petitioners had standing, pursuant to § 853(n), to seek judicial review of the criminal forfeiture. The Petitioners responded with opposition papers, as well as the instant motions. The Government declined to respond to the Petitioners' motions for summary judgment at that time, calling them "premature." (Gov.'s Mot. Dis. Reply Br. 2-3.)

This Court held a hearing on the Government's motions to dismiss the petitions on April 12, 2006. At this hearing, two of the Government's motions were granted, and twenty-two were denied. (Hr'g Tr. 61, Apr. 12, 2006; Order of April 25, 2006.) A schedule was set for briefing of the instant motions.

## LEGAL STANDARD

### I. Criminal forfeiture: the ancillary proceeding

When sentencing a defendant for a violation of 18 U.S.C. § 1960, the Court is authorized to order the forfeiture to the United States of property involved in the offense, pursuant to 18 U.S.C. § 982. Following the entry of an order of forfeiture, and publication of notice, third parties claiming an interest in the forfeited property may contest the forfeiture, pursuant to 21 U.S.C. § 853(n). This section sets forth a procedure to adjudicate the validity of the order of forfeiture, known as an ancillary proceeding. In brief,

the petitioner may invalidate the order of forfeiture by establishing, by a preponderance of the evidence, that the petitioner has a legal right, title, or interest in the property that was superior to any right, title, or interest of the defendant at the time of the crime. 21 U.S.C. § 853(n)(6)(A).

Additional procedural rules for conducting the ancillary proceeding are set forth in FED. R. CRIM. P. 32.2(c). The provision in Rule 32.2(c)(1)(B) states:

> After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

## II. Summary Judgment

Summary judgment is appropriate under FED. R. CIV. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255).

"When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir.1991)). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material

fact for trial. *Anderson*, 477 U.S. at 248; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); see *also* FED. R. CIV. P. 56(e) (requiring nonmoving party to "set forth specific facts showing that there is a genuine issue for trial"). "A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial." *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001).

If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, . . . there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992) (quoting *Celotex*, 477 U.S. at 322-23).

## DISCUSSION

### I. Petitioners' Motions for Summary Judgment

Petitioners' argument is straightforward: Nolasco had no right, title, or interest in the bank accounts, and so she had nothing to forfeit. Petitioners contend that the Government has not even alleged that

Nolasco had any such right, title, or interest, no less offered evidence of it. Nor has the Government disputed that Petitioners are the registered holders of the seized bank accounts. As there is no dispute that Nolasco had no interest, and no dispute that the account holders have an interest in the accounts, Petitioners ask that summary judgment be entered in their favor.

At the hearing on the Government's motions to dismiss, this Court asked the Government repeatedly to articulate a basis on which this Court might conclude that Nolasco had a forfeitable interest in the bank accounts, or a basis for the Government to continue to hold the funds if Nolasco had no such interest. (Hr'g Tr. 38, 40, 42, 52, Apr. 12, 2006.) The Government asked for the opportunity to brief a response. (*Id.* at 40.) This Court granted the Government's request and ordered the parties to brief two issues: 1) did Nolasco have a forfeitable interest in the accounts? 2) if the consent judgment is vacated, what order should take its place? (*Id.* at 53, 58.)

The Government submitted a brief that makes no claim that Nolasco had any right, title, or interest in the accounts. Rather, the Government's answer to the first question is stated in a single sentence in a footnote: "Discovery of the parties in whose names those accounts were held – the petitioners – would be necessary to determine the nature and extent of defendant Nolasco's interest in the seized bank

accounts."[3] (Gov.'s Opp. Br. 4 n.3.) This states the Government's response to this Court's question on Nolasco's interest in its entirety. Conspicuously absent is any legal theory of Nolasco's interest in the property, as well as any explanation of what evidence might be found through discovery to support such a theory. In sum, the Government asks this Court to continue to take on faith that it may, somehow, one day, demonstrate a right to this property. After four years, it is neither legal nor just to do so.

To defeat a *motion for summary judgment*, the Government must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248. The Government has offered no evidence whatever. No reasonable jury could find in the Government's favor based on the present record.

The Government has offered this Court no basis from which to conclude that Nolasco had any right, title, or interest in the forfeited property.[4] Petitioners have submitted sworn affidavits as evidence that they

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[3] Even if this Court were to interpret this statement as a request for discovery pursuant to FED. R. CIV. P. 56(f), the substance of the response is insufficient to comply with Rule 56(f). The Government fails to set forth a good faith basis to believe that Nolasco might have a right, title, or interest in the accounts that discovery would uncover.

[4] Nor has the Government developed a theory under which Nolasco *might* have any right, title, or interest in the forfeited property.

are the registered holders of the bank accounts, and the Government does not dispute this. Since Nolasco has no rights, Petitioners' rights to the accounts are necessarily superior to Nolasco's. Petitioners have satisfied the statutory requirement of establishing, by a preponderance of the evidence, that each petitioner has a legal right, title, or interest in the property that was superior to any right, title, or interest of the defendant Nolasco at the time of the crime. 21 U.S.C. § 853(n)(6).

The Government submitted a brief in which it ignored this Court's Order of April 12, 2006. Rather than answer the question that this Court asked – did Nolasco have a forfeitable interest in the accounts? – the Government is recycling the argument it made in its motions to dismiss: the petitioners lack standing to challenge the forfeiture. This Court rejected that argument when the Government made it before, and it rejects it now. Had this Court agreed with the Government's standing argument, the Government's motions to dismiss the Petitions would have been granted.

The doctrine of the law of the case bars relitigation of the issue of Petitioners' standing. This doctrine militates against re-deciding issues of law previously resolved in the same case, either expressly or by implication. *Public Interest Research Group of N.J., Inc. v. Magnesium Elecktron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997). When this Court denied the motions to dismiss, it decided that the Petitioners had

standing to contest the forfeiture. The law of the case prevents the Government from relitigating this issue.

The Government attempts to escape the law of the case with the contention that it is now arguing Article III standing, whereas the motions to dismiss involved statutory standing. This argument looks to form and ignores content; in the context of this case, the distinction is illusory. It is true that the Government moved to dismiss the petitions for failure to meet the statutory standing requirements of § 853(n)(3) – based on the failure to "set forth the nature and extent of the petitioner's right, title, or interest in the property [and] the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property." The Government now argues, in essence, that this Court's decision that the Petitioners met these statutory requirements did not decide whether they met the Constitutional "case or controversy" requirement. This is formalism without sense. A petitioner who has set forth the nature and extent of his or her right to property, and is seeking its return, cannot fail to meet the "case or controversy" requirement.

Moreover, as a matter of substantive law, the Petitioners, as named account holders, have an interest in the property. "Property interests are created and defined by state law." *Butner v. United States,* 440 U.S. 48, 55 (1979). The ownership of bank accounts held in New York is decided under New York law. *United States v. Khan,* 1997 U.S. App. LEXIS 31870 (2d Cir. 1997). Generally, bank deposits are divided

into two categories: general and special. *Peoples Westchester Sav. Bank v. Federal Deposit Ins. Corp.*, 961 F.2d 327, 330 (2d Cir. 1992). "A deposit made in the ordinary course of business is presumed to be general." *Id.* When a general deposit is made, the transaction is considered to be essentially a loan to the bank, with a contractual right to repayment on demand. *United States v. $ 79,000 in Account No. 2168050/6749900 at the Bank of N.Y.*, 1996 U.S. Dist. LEXIS 16536 (S.D.N.Y. 1996). The Petitioners have submitted sworn statements in which their deposit of the funds is either stated or implied. The Government has not disputed that Petitioners deposited the funds into the accounts. They have a contractual right to repayment of the funds on demand.

Furthermore, the named holder of a bank account has an ownership interest in the funds in the account. *See, e.g., United States v. Contents of Account Numbers 208-06070 & 208-06068-1-2*, 847 F. Supp. 329, 333 (S.D.N.Y. 1994). "The fact that funds are deposited in a person's name is prima facie evidence that the funds belong to such person." 9 C.J.S. *Banks and Banking § 280* (2005). At a minimum, then, the Petitioners have submitted prima facie evidence of ownership of the funds in the accounts.

The Government does not dispute that the Petitioners are the named holders of the bank accounts. Nor does the Government attempt to circumvent their rights under New York property law. Rather, the Government relies on a "true owner" argument to challenge standing: even though Petitioners are the

named account holders, someone else is the true owner of the funds. Because someone else is the true owner of the funds, the Government argues, the named account holders have no standing to contest the forfeiture. The Government cites no law to support this argument, which has no apparent legal foundation. Even if it were true that some other party has a right to the funds superior to a petitioner's, that neither nullifies the petitioner's right against Nolasco, nor deprives the petitioner of standing. The "true owner" argument fails from the start. Nothing that discovery might produce can rescue it.

To defeat the motions for summary judgment, the Government has cloaked the standing argument in two related procedural arguments. First, the Government argues that there are material factual disputes about the Petitioners' standing. Second, the Government argues that discovery as to these disputed issues of standing is needed, and that, in the absence of discovery, summary judgment is premature. Because this Court rejects the premise of these arguments, and holds that the Petitioners have established their standing, these procedural arguments must fail.

A. Do outstanding factual issues preclude summary judgment?

The Government contends that genuine issues as to material fact concerning the Petitioners' interests in the property preclude summary judgment, and points to three matters:

1. Escrow Agents

The Government argues that some of the property is held in escrow, and that "rights to property in escrow can be complicated." (Gov.'s Opp. Br. 6.) The Government points to one petition, that of Farswiss Asset Management Ltd., which states that it operates as an escrow agent and "disburses funds previously deposited in the VNB account pursuant to customers' instructions to it as escrow agent." (Farswiss Pet. ¶ 8.) Yet Farswiss also states that the funds in its account were either owned by Farswiss or held in escrow for clients, none of whom is Nolasco.

Even if it is true that rights to property in escrow can be complicated, it is not complicated to determine who has superior rights to funds, as between someone with no rights and an agent holding the funds in escrow. This Court need not address whatever complications may be involved in determining the rights of the escrow agent relative to the principals. The Government argues that the statements of Farswiss provide a basis to infer that the "true" owner of the funds is someone other than Farswiss. This may be so, but this Court is not charged with determining who in the world has the ultimate right to the funds. Under § 853(n)(6), the inquiry is limited to determining whether the interest of any petitioner was superior to that of Nolasco. The Government has provided no foundation for its assumption that identifying the "true" owner has legal relevance to the matter before the Court.

The Government's escrow argument fails to persuade this Court that factual disputes on this subject preclude summary judgment.

2. Conflicting Statements of Petitioners

The Government argues that joint petitioners Fausto L. Guimaraes and Helder J.S.F. Taveira made conflicting statements about the source of the funds in their account. On this basis alone, the Government argues that "[f]actual issues with respect to the genuineness of their ownership interest are rife." (Gov.'s Opp. Br. 7.) This is unpersuasive. While this might raise a question about the source of the funds in their account, it does not raise any question about whether their interest in the account is superior to Nolasco's.

The Government's conflicting statements argument fails to persuade this Court that factual disputes on this subject preclude summary judgment.

3. Shells and Straw Owners

The Government alleges that several of the account holders were shell companies or straw owners. This argument suffers from two problems. First, it is based on mere conclusory allegations, as the government points to no evidence whatever. Second, this is another version of the "true owner" argument. As already discussed, this Court is not charged with considering all possible owners and determining

whose interest among them will trump. Pursuant to § 853(n)(6), this Court must only compare the interest of each petitioner to that of Nolasco. The Government provides no legal basis for its assumption that determining whether a petitioner is a shell company has relevance to this task.

The Government has not persuaded this Court that any factual issues preclude summary judgment, nor that discovery of these matters is needed.

B. Is summary judgment premature?

The Government contends that, under FED. R. CRIM. P. 32.2(c)(1)(B), summary judgment is procedurally premature. The Government has misread the clear language of the rule, which states that "the court *may* permit the parties to conduct discovery . . . if the court determines that discovery is necessary or desirable to resolve factual issues." FED. R. CRIM. P. 32.2(c)(1)(B) (italics added). As discussed above, the Government has failed to show that there are genuine issues as to any material facts. Nor has the Government persuaded this Court that discovery is needed or desirable.

Courts manage discovery requests in an ancillary proceeding using procedures analogous to those available under the Civil Rules. The Advisory Committee's notes to Rule 32.2(c) state: Subdivision (c) "describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include . . . conducting discovery, disposing of a

claim on a motion for summary judgment . . . " The principles of discovery under the Civil Rules are set forth in FED. R. CIV. P. 26. Under FED. R. CIV. P. 26(b)(1), discovery is limited to that which is relevant.

Considering the relevance standard of Rule 26, this Court determines that the Government's request to be allowed discovery is problematic and unpersuasive. First, as discussed above, the Government has not developed any legal theory of Nolasco's interest in the property.[6] Such a theory is needed to show how discovery in regard to the account holders would produce information relevant to the § 853(n)(6) inquiry. Second, although the single sentence in the footnote states that discovery is needed to determine Nolasco's interest in the property, not one item in the Government's list of proposed subjects of discovery even mentions Nolasco. (Gov.'s Opp. Br. 11.) Nor do

[6] At the hearing on the motions to dismiss, the Government suggested that one theory might be that Nolasco acquired a right to the property by virtue of her role as agent for the account holders. Hr'g. Tr. 39, Apr. 12, 2006.) The Government omitted this theory in its brief, perhaps realizing that the law of agency would not support arguing that an agent's right to the principal's property could be superior to the principal's. The Government has also previously speculated that the Petitioners might be mere bailees. (Gov.'s Mot. Dis. Reply Br. 13.) That theory, too, has fallen by the wayside.

any of the items in the list appear to be relevant to Nolasco's interest.[6]

The Government has provided no basis for this Court to infer that the proposed discovery will lead to information relevant to the § 853(n)(6) inquiry. Rather, the proposed discovery is directed to investigating whether some other third parties have rights to the property superior to the account holders of record.[7] This is irrelevant to the analysis this Court must perform pursuant to § 853(n).

"Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Because the Government has not pointed to any relevant areas for discovery, this Court determines that discovery is neither necessary nor desirable to resolve factual issues. As there need be no discovery, FED. R. CRIM. P. 32.2(c)(1)(B) specifically

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[6] Curiously, in all of the speculation in its briefs about the "true owner" of the property, the Government never even hints that Nolasco was the true owner.

[7] In summing up its argument, the Government states: "Discovery is necessary to resolve a multitude of issues related to whether petitioners have Article III standing in this matter." (Gov.'s Opp. Br. 11.) Since this Court does not believe that there is any question about whether account holders have standing in regard to the forfeiture of their accounts, the Government has not shown that discovery is necessary. Moreover, this Court has decided the issue of standing. Discovery cannot be granted to litigate a settled issue.

authorizes this Court to resolve the issue before it on a motion for summary judgment.

The Government attempts to support its argument that summary judgment is premature by quoting the Second Circuit out of context: "Only after some discovery has taken place may a party move for summary judgment." *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004). *Pacheco* did not involve summary judgment but, instead, a motion to dismiss the petition. The Second Circuit's point was that no evidentiary burden should be placed on the petitioner at that early stage in the ancillary proceeding; the court did not address any issues of the timing of a motion for summary judgment.

The Government also cites *United States v. Bennett*, 423 F.3d 271, 275 (3d Cir. 2005) in support of its position. *Bennett*, however, does no more on these issues than to cite without comment FED. R. CRIM. P. 32.2.

Finally, the Government cites *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984), in which the Third Circuit stated: "This court has criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party." The key word here is "pertinent." As discussed above, the Government has pointed to no unanswered pertinent areas of discovery.

C. The policy underlying criminal forfeiture

The Supreme Court has called it a "simple fact" that criminal forfeiture is a punishment of a defendant for criminal conduct. *Libretti v. United States*, 516 U.S. 29, 41 (1995). A criminal forfeiture must punish the defendant. In this case, the Government seized bank accounts belonging to third parties pursuant to a plea agreement entered into with Nolasco. It is worth noting that the Government has not argued that seizing the bank accounts punished Nolasco, perhaps because it is obvious that a bank employee is not punished by the seizure of accounts in which she has no property interest.

D. The Government's Supplementary Declaration

On May 22, 2006 – well past the Government's May 3 briefing deadline, and past Petitioners' May 17 reply deadline – the Government submitted the supplementary declaration of Thomas Dombrowski. The Government did not seek leave of this Court to submit this declaration, nor was any leave granted. Were this Court inclined to consider the submission, the Government's conduct would be unfair to the Petitioners, who completed their reply briefing without the benefit of the complete materials relied on by the Government.

Even if this Court agreed to consider this declaration – which it does not – the conclusions stated above would not be affected. Dombrowski's declaration raises questions about the legality of the

Petitioners' activities in Brazil. Yet at no point has the Government presented a legal argument to establish the relevance of this information. Even if every allegation is true, and Petitioners have used these bank accounts in connection with violations of Brazilian law, this Court has no basis to consider this in determining rights to the property pursuant to § 853(n)(6). The Government does not point to any legal authority to establish relevance, nor does this Court see how consideration of it is permissible.

Again, Congress intended the criminal forfeiture statutes to punish defendants. The Petitioners are not defendants in this case. The legality of their conduct is not at issue. If Nolasco had a right to these accounts, it might be just to punish her by making her forfeit them. If Nolasco has no right to the accounts, she is not punished by their seizure.

Dombrowski's declaration also supports the Government's "true owner" argument. Again, the Government has not laid the legal foundation for the inference that this has relevance to the § 853(n)(6) determination.

Dombrowski's declaration suggests to this Court that the Government seeks to transform this criminal forfeiture proceeding into a tool for investigation of Brazilian crime and international financial wrongdoing. Were this Court to comply, it would far exceed the bounds of the role assigned to it by the criminal forfeiture statutes.

## CONCLUSION

The parties do not dispute that the Petitioners are the named holders of the accounts seized by the Government. The Government has offered no evidence nor any other basis for this Court to infer that Maria Carolina Nolasco held any right, title, or interest in the forfeited property. Petitioners have demonstrated that "there is no genuine issue as to any material fact and that [they are] entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Petitioners have proven, by a preponderance of the evidence, that their right, title or interest in the forfeited property is superior to that of Nolasco. Pursuant to 21 U.S.C. § 853(n)(6)(A), this determination renders the Order of Forfeiture invalid as to every Petitioner named herein. Petitioners' motions for summary judgment are granted. This Court shall amend the Order of Forfeiture in accordance with this determination.

S/Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

Date: June 6, 2006

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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|---|---|
| UNITED STATES OF AMERICA | Hon. Joseph A. Greenway, Jr. |
| | Criminal No. 04-617 |
| v. | **AMENDED ORDER AMENDING PRELIMINARY ORDER OF FORFEITURE** |
| MARIA CAROLINA NOLASCO | (Filed June 8, 2006) |

**GREENAWAY, JR., U.S.D.J.**

This matter having come before the Court on the motions for summary judgment by Petitioners,[1] pursuant to FED. R. CRIM. P. 32.2(c) and FED. R. CIV. P. 56; and it appearing that this Court reviewed the parties' submissions; and for the reasons set forth in

[1] Movants are twenty-two petitioners: (1) Armando Pereira Reis and Jose Moacir Guimaraes, (2) Avion Resources Ltd., (3) Bahia Blanca Ltd., (4) Best Consulting Ltd., (5) Beverly Hills Group, Inc., (6) Bradner Investments S.A., (7) Braza Corp., (8) Chettiar Business, Inc., (9) Fares Baptista Pinto and Jose Baptista Pinto Neto, (10) Farswiss Asset Management Ltd., (11) Fausto L. Guimaraes and Helder J.S.F. Taveira, (12) Gatex Corp., (13) Harber Corp., (14) Harborside Corp., (15) Mabon Corp., (16) Midland Financial, Inc., (17) Phoenix Export Import S.A., (18) Piedade Pedro de Aimeida, (19) Pompeu Costa Maia and Isabel Cristina Dutra Pinheiro Maia, (20) Safe Port Investment Corp., (21) Silver Commodities Ltd., and (22) Tigrus Corp. (collectively, "Petitioners.") Best Consulting and Braza did not file motions, but were granted leave to join in the motions for summary judgment. (Hr'g Tr. 55, Apr. 12, 2006.)

the accompanying Opinion, and good cause appearing,

IT IS on this 7th day of June, 2006,

ORDERED that Petitioners' motions for summary judgment (Docket Entry Nos. 77, 78, 89, 97, 99-105 inclusive, 108, 109, 116, 118, and 122) are GRANTED; and it is further

ORDERED that this Court's December 13, 2004 Preliminary Order of Forfeiture is hereby AMENDED, and Exhibit A to that Order is replaced by the amended Exhibit A attached to this Order, and the asset totals in the December 13, 2004 Order shall be considered revised accordingly; and it is further

ORDERED that a copy of this Order be served on the parties within seven (7) days of the entry of this Order.

S/Joseph A. Greenway, Jr.
JOSEPH A. GREENWAY, JR.,
U.S.D.J.

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**EXHIBIT A**

| ACCOUNT NAME | ACCOUNT NUMBER | AMOUNT |
|---|---|---|
| DOYEN CORPORATION | 9004366 | $97,193.43 |
| FLORIDA FINANCIAL GROUP | 9010264 | $554,435.85 |

| | | |
|---|---|---|
| CAPITAL WORLD | 9008308 | $70,348.45 |
| PACIFIC WAY FINANCIAL INC. | 9007006 | $247,455.83 |
| STAR FINANCING CORP. | 9001763 | $148,767.38 |
| ALFREDO GIANGRANDE | 9201415 | $126,065.68 |
| GOLDRATE CORP. | 9007532 | $381,187.91 |
| PARNED INVESTMENTS LTD. | 9007647 | $472,686.50 |
| FRANCISCO MAURICIO DA SILVA | 87000237 | $172,369.84 |
| ALGEMIRO MOUTINHO | 87000679 | $117,680.13 |
| PEICAN HOLDING GROUP | 9007110 | $87,503.53 |
| MILANO FINANCE INC. | 90050351 | $688,611.66 |
| VIGA INTERNATIONAL INC. | 9010192 | $20,120.32 |
| CLAUDIO DEBIANCO | 9200690 | $23,401.92 |
| SERGIO SAMUEL LEANDRINI | 87000741 | $30,912.58 |
| BEIRA-MAR | 83004848 | $50,753.37 |

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT,

David Friedman, J.P.
Joseph P. Sullivan
John T. Buckley
Bernard J. Malone, Jr., JJ.

2030-2030A
Index 402579/06

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Robert M. Morgenthau, District Attorney of New York County,
Plaintiff-Appellant,

-against-

Avion Resources Ltd., et al.,
Defendants-Respondents.

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Plaintiff appeals from an order of the Supreme Court, New York County (Martin Shulman, J.), entered February 15, 2007, which denied plaintiff's ex parte application to file affidavits of service out of time and have them deemed timely filed, nunc pro tunc; and from an order and judgment (one paper), same court and Justice, entered February 27, 2007, which denied the motion to confirm an attachment order, granted defendants' cross motions to vacate the attachment order and to dismiss the complaint, dismissed the complaint with prejudice and directed plaintiff to return to defendants all assets being held pursuant to the attachment order.

Robert M. Morgenthau, District Attorney, New York (Michael S. Morgan and Mark Dwyer of counsel), for appellant.

Howrey LLP, New York (James G. McCarney and Grace L. Chan of counsel), for Avion Resources Ltd., Elza Xerfan Haber, Gustavo Xerfan Haber, Meg Luna Soares Haber, Michael Homci Haber, Tigrus Corporation, Pompeu Lima Pinheiro Maia, Isabel Cristina Dutra Pinheiro Maia, Jose Baptista Pinto Neto and Fares Baptista Pinto, respondents.

Bernard D'Orazio, P.C., New York (Bernard D'Orazio of counsel), for Harber Corp., Antonio Pires de Almeida, Roseli Ciolfi, Gatex Corp., Regina Ruriko Inoue, Mabon Corp., Elicio Areias, Antonio Carneiro, Piedade Pedro Almeida and Gustavo Henrique Correia Puga, respondents.

Gleason & Kaotz, LLP, New York (John P. Gleason of counsel), for Farswiss Asset Management Ltd., respondent.

Busson & Sikorski, New York (Robert S. Sikorski and Berenice Busson of counsel), for Chettiar Business, Inc., Joacyr Reinaldo, Fernando Janine Ribeiro, Harborside Corporation, Joao Carlos da Cunha do Canto Kneese, Safe Port Investment Corp., Fausto Luiz Vaz Guimaraes and Helder Jose Simoes Franco Taveira, respondents.

FRIEDMAN, J.P.

In 2002, the United States seized millions of dollars from defendants' accounts at a New York County bank (then known as Merchant's Bank, subsequently renamed Valley National Bank) and

transferred the funds out of state in connection with a prosecution in the District of New Jersey. Although there was no federal indictment of any of these defendants (each an individual of Brazilian nationality or an off-shore corporate entity), the Government held defendants' money in anticipation of showing that the one person who was indicted – Carolina Nolasco, a bank employee who pleaded guilty to using defendants' accounts to operate an illegal money transmittal business – possessed some forfeitable interest in the bank accounts. Four years after the money was seized, and more than a year and a half after Nolasco's guilty plea, the federal court issued an opinion and an order, each dated June 6, 2006, and entered June 7, 2006, granting defendants summary judgment on their petitions to recover their money.[1]

When the federal court handed down its ruling that defendants were entitled to the return of their

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[1] In rejecting the Government's contention that it should be permitted to conduct further discovery in pursuit of evidence that Nolasco held a forfeitable interest in the funds, the federal court stated: "[T]he Government asks this Court to continue to take on faith that it may, somehow, one day, demonstrate a right to this property. After four years, it is neither legal nor just to do so." The federal court further noted: "[The Government's submission] suggests ... that the Government seeks to transform this criminal forfeiture proceeding into a tool for investigation of Brazilian crime and international financial wrongdoing. Were this Court to comply, it would far exceed the bounds of the role assigned to it by the criminal forfeiture statutes."

money, the United States Attorney, instead of appealing or returning the funds to defendants, asked plaintiff, the New York County District Attorney, if his office had any interest in commencing proceedings relating to the funds. About two weeks later, on June 20, 2006, plaintiff obtained from Supreme Court, New York County, an ex parte order of attachment pursuant to CPLR 1317 (the June attachment order), purporting to attach all funds of defendants constituting the proceeds or instrumentalities of their alleged operation of illegal money transmittal businesses in violation of the Banking Law, in aid of plaintiff's soon-to-be-commenced action seeking civil forfeiture of such funds under CPLR article 13-A.[2]

At the time the June attachment order was issued, the funds it sought to attach were not in a New York bank; as previously stated, the federal government, upon seizing defendants' account at the New York bank in 2002, transferred the money to an out-of-state bank. Supreme Court granted the June attachment order based upon an affirmation by an Assistant District Attorney representing that the money sought to be forfeited "is currently held by the United States government by and through its agent

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[2] Plaintiff subsequently filed his civil forfeiture complaint on June 29, 2006. In August 2006, a New York County grand jury returned an indictment charging each defendant with operating an unlawful money transmittal business in violation of Banking Law § 650(2)(b)(1). The indictment is not at issue on this appeal.

located in New York County, counsel for the Customs and Border Patrol Service, a governmental subdivision of the Department of Homeland Security, Immigration and Customs Enforcement." Pursuant to the June attachment order's authorization of levy upon any garnishee "having possession or custody of property in which any of the defendants has an ownership interest," plaintiff served the order upon the Customs and Border Patrol Service on June 20, 2006. Thereafter, the federal government transferred approximately $17,744,000 – monies belonging to defendants that had already been withheld from them since 2002 – to a New York County bank account under plaintiff's control.

The June attachment order was ultimately vacated by Supreme Court on the ground that plaintiff failed to serve his motion to confirm the order within five days after the levy, as required by CPLR 1317(2).[3] Before the vacatur of the June attachment order, however, plaintiff obtained a second ex parte order of attachment, dated August 2, 2006 (the August attachment order). Although plaintiff served the motion to confirm the August attachment order within the required five-day period, Supreme Court subsequently vacated that order as well. The August attachment order was vacated on the ground that the attached funds had been brought

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[3] We agree with Supreme Court that CPLR 1317(2) required plaintiff to serve the motion to confirm the ex parte order of attachment within five days after levy.

back into New York as the result of the issuance of the June attachment order, which, the court believed, it had lacked jurisdiction to issue because the funds were at that time deposited in a bank outside of New York. On plaintiff's appeal, we affirm.

Plaintiff concedes that he could not levy directly upon the out-of-state bank accounts in which the federal government held the funds at issue when the June attachment order was signed, because those bank accounts, being outside New York, were beyond the jurisdiction of the New York courts (*see Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts,* 269 AD2d 101 [2000]). Accordingly, plaintiff presents two alternative arguments to support the validity of the federal government's transfer of the funds to him in New York.

First, plaintiff points out that his office did not levy directly upon the out-of-state banks where the money was held, but instead levied upon a New York garnishee that controlled those bank accounts, namely, the New York County office of the Customs and Border Patrol Service of the United States Department of Homeland Security (Homeland Security). In support of this contention, plaintiff correctly notes that the New York courts have the power to command a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.,* 41 AD3d 25, 31 [2007]; *Miller v Doniger,* 28 AD3d 405 [2006]; *Starbare II Partners v Sloan,* 216 AD2d 238, 239 [1995]).

Secondly, plaintiff makes the alternative argument that no levy was executed pursuant to the June attachment order because, "in reality, the federal government . . . voluntarily agree[d] to transfer [defendants'] monies to [plaintiff]." Plaintiff elaborates in his reply brief:

> "After all, under general supremacy principles, federal law enforcement agencies are not bound to honor state court orders demanding the delivery of property within their custody. Thus, absent an agreement to do so, the federal authorities in this case would have had no obligation to honor Supreme Court's June 20th attachment. . . . [I]t is clear that the federal authorities' decision to transfer defendants' monies to [plaintiff] was indeed a voluntary one, as it derived from the United States Attorney's equally voluntary decision to forgo further proceedings [in New Jersey federal court] in view of 'the decision of the New York County District Attorney's Office to pursue a prosecution' of defendants." (Record citation omitted.)[4]

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[4] The quotation within the excerpt from plaintiff's brief is from a letter, dated June 21, 2006, that the United States Attorney for the District of New Jersey sent to United States District Judge Joseph A. Greenaway, Jr., the day after the June attachment order was served on Homeland Security. The letter stated, among other things: "The [District] Court having by its June 7, 2006 Order [granting defendants summary judgment on their petitions to recover their money] relinquished federal

(Continued on following page)

Notwithstanding the United States Attorney's statement to the federal court that Homeland Security was "obligated" to comply with the June attachment order (*see* footnote 4 hereof), we are persuaded by plaintiff's supremacy argument that Homeland Security's transfer of the funds to his control was voluntary. The conclusion we draw from this, however, is that, under the circumstances that existed at the time, the transfer was executed: (1) without valid judicial sanction by Supreme Court; (2) in contravention (even if inadvertent, as we assume it was) of the order of the New Jersey federal court ruling that defendants were entitled to the return of their money; and (3) so far as plaintiff has shown, without statutory authorization. Accordingly, we hold that Supreme Court properly declined to afford the June 2006 transfer retroactive validation on the basis of the subsequent August attachment order.

Plaintiff concedes both (1) that he could not (and did not) levy directly upon the out-of-state bank accounts in which the funds were held when the June attachment order was issued, and (2) that Homeland Security, even though present in New York County, could not be compelled, as garnishee, to transfer the

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jurisdiction over the property, it is the view of the undersigned that the entity that has custody of the funds, the U.S. Department of Homeland Security, Customs and Border Protection, is obligated to comply with the state court order by turning over those funds." Again, plaintiff now argues that Homeland Security was not obligated to comply with the June attachment order.

funds pursuant to a state court order. It therefore follows that the transfer of the funds was an entirely voluntary transaction between two law enforcement agencies. The problem is that this transfer was extrajudicial, since, to reiterate, Supreme Court had no power to compel the supposed garnishee to turn over the funds. Moreover, at the time the transfer occurred, the New Jersey federal court had already issued an *order* granting defendants summary judgment determining that they were entitled to the return of the funds.[5] By arranging the voluntary transfer of the funds from Homeland Security to plaintiff immediately after the New Jersey federal court ruled that the federal forfeiture order was invalid as to defendants and that they were entitled to the return of the funds, the United States Attorney and plaintiff appear to have circumvented the New Jersey federal court's determination of a matter within its jurisdiction. Although there is neither reason to doubt that the circumvention was

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[5] The federal court's opinion, dated June 6, 2006, and entered June 7, 2006, stated: "Petitioners [defendants herein] have proven, by a preponderance of the evidence, that their right, title or interest in the forfeited property is superior to that of Nolasco. Pursuant to 21 U.S.C. § 853(n)(6)(A), *this determination renders the Order of Forfeiture invalid as to every Petitioner named herein*" (emphasis added). The Order Amending Preliminary Order of Forfeiture, of the same date, decreed that it was "ORDERED that Petitioners' motions for summary judgment . . . are GRANTED." An Amended Order Amending Preliminary Order of Forfeiture, dated June 7, 2006, and entered June 8, 2006, was identical in pertinent part.

inadvertent, nor any reason to question the good faith of the prosecutors involved, this manner of proceeding nonetheless strikes us as flawed in both form and substance.

It might be argued that a transfer of seized property from the federal government to a state law enforcement agency, even if not sanctioned in advance by competent judicial authority, would be valid if authorized by a federal statute, assuming the state agency sought judicial confirmation promptly thereafter to comply with the requirements of due process. Unfortunately, plaintiff does not identify any provision of federal law that authorized the fund transfer at issue here.

Plaintiff's citation of 19 USC § 1616a(b)(1) – which, in any event, he has not specifically argued to have been applicable – does not assist him; indeed, it only highlights the lack of authorization for the transfer in question. In pertinent part, 19 USC § 1616a ("Disposition of forfeited property") provides:

> "(a) State proceedings
>
> " . . . If a complaint for forfeiture is filed under this chapter, the Attorney General may seek dismissal of the complaint in favor of forfeiture under State law.
>
> "(b) Transfer of seized property; notice
>
> "If forfeiture proceedings are discontinued or dismissed under this section –

> "(1) the United States may transfer the seized property to the appropriate State or local official; and
>
> "(2) notice of the discontinuance or dismissal shall be provided to all known interested parties."[6]

The forfeiture proceedings against defendants' funds, however, were not dismissed pursuant to a decision by the United States Attorney (as designee of the Attorney General) to exercise the power under 19 USC § 1616a(a) to "seek dismissal of the [forfeiture] complaint in favor of forfeiture under State law." Rather, the federal court granted motions by defendants – not an application by the Government, as contemplated by 19 USC § 1616a(a) – for summary

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[6] Although this statute appears in title 19 of the United States Code, entitled "Customs Duties," it may be made applicable to criminal forfeiture proceedings under 18 USC § 982 (the statute under which the federal government seized defendants' bank accounts) by a series of incorporations by reference (*see* 18 USC § 982[b][1] ["The forfeiture of property under this section . . . shall be governed by the provisions of" 21 USC § 853, with an exception not relevant here]; 21 USC § 853[j] ["Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section"]; 21 USC § 881[d] ["The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; (and) the disposition of such property . . . shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof").

judgment invalidating the order of forfeiture as to them, over the vigorous opposition of the United States. Only after the forfeiture proceeding had already been dismissed as against defendants' funds, at defendants' instance and over the federal government's objection, did the United States Attorney decide to transfer the funds to plaintiff. Thus, even assuming that 19 USC § 1616a was potentially applicable in the 18 USC § 982 criminal forfeiture proceedings involving defendants' funds, those proceedings were not "discontinued or dismissed under" § 1616a, as required to authorize the United States to "transfer the seized property to the appropriate State or local official" pursuant to 19 USC § 1616a(b)(1).

In sum, defendants' funds were brought into New York by a transfer from the federal government to plaintiff that Supreme Court had no power to order. That transfer effectively contravened the order of the New Jersey federal court that had jurisdiction of those funds at the time, and the transfer has not been shown to have been authorized by any provision of federal law. Since any jurisdiction Supreme Court possessed to enter the August attachment order necessarily arose from the prior extrajudicial transfer of the funds into New York, it appears that the flaws of the June transfer extend to the August attachment order that would not have been possible but for that transfer. We recognize that the Court of Appeals has held that second attachment order may be allowed to cure a purely procedural defect in a prior attachment order (*see Mojarrieta v Saenz*, 80 NY 547 [1880]).

That principle, however, has no application here, where the property and garnishee in question were beyond the reach of the first attachment order, and the second attachment order is jurisdictionally predicated on what was, in effect, an extrajudicial seizure.

Even if it could be argued that the August attachment order was nonetheless technically acceptable, it cannot be said that, under these circumstances, Supreme Court abused or improvidently exercised its discretion in declining to confirm the August attachment order (*see* CPLR 1312[3] ["A court *may* grant an application for a provisional remedy" under article 13-A if proper showing is made] [emphasis added.]; *cf.* CPLR 6201 [under CPLR article 62, attachment "*may* be granted" if proper showing is made] [emphasis added]; *J.V.W. Inv. Ltd. v Kelleher,* 41 AD3d 233, 234 [2007] [whether to grant an attachment under CPLR article 62 is discretionary upon proper showing]). Thus, there is no basis for setting aside Supreme Court's vacatur of the August attachment order.

We also affirm Supreme Court's dismissal of the complaint for lack of personal jurisdiction, based on invalid service of process. As to the individual defendants, all of whom are Brazilian, it is true that the Inter-American Convention on Letters Rogatory, to which the United States and Brazil are signatories, does not provide the exclusive means by which a plaintiff resident in one signatory nation may serve process on a defendant residing in another signatory

nation (*see Kreimerman* v *Casa Veerkamp, S.A. de C.V.*, 22 F3d 634 [5th Cir 1994], *cert denied* 513 US 1016 [1994]; *Laino v Cuprum S.A. de C.V.*, 235 AD2d 25 [1997]). The non-mandatory nature of the Inter-American Convention does not mean, however, that otherwise applicable principles of international comity are displaced, so that United States courts must condone service of process on persons within signatory nations by means that violate those nations' laws (*see Kreimerman,* 22 F3d at 643-644 ["Plaintiffs who elect not to avail themselves of the Convention machinery assume the risk that other legal principles, like the principle of international comity, might hinder their establishment of jurisdiction over the defendants"]). In *Kreimerman,* for example, the Fifth Circuit, while holding that the means of service provided by the Inter-American Convention were not exclusive, directed the district court, upon remand, to consider whether service pursuant to the Texas Long-Arm Statute "comport[ed] with principles of comity" (22 F3d at 647; *see also id.* at 644 ["whether service of process under the Texas Long-Arm Statute on defendants residing in Mexico contravenes notions of comity" was among the "considerations . . . for the district court on remand"]).

Here, as plaintiff concedes, "Brazilian law requires that service of process by foreign nations be made pursuant to a letter rogatory or a letter of request transmitted through diplomatic channels" (*Matter of Commodity Futures Trading Commn. v Nahas*, 738 F2d 487, 494 [DC Cir 1984]). It is

uncontroverted that service was not made in this manner here. We therefore agree with Supreme Court that the principle of comity counseled granting the motion to dismiss so as not [sic] condone service of the process of the New York courts in Brazil by means offensive to Brazilian law.

The corporate defendants are mostly incorporated in the British Virgin Islands (BVI), a signatory to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. Although plaintiff now argues that he served the BVI-incorporated defendants in accordance with the Hague Convention, he did not make this argument before the Supreme Court. Therefore, it is not preserved. To the extent that plaintiff served the corporate defendants by delivering the process to corporate representatives in Brazil, the corporations, like the individual defendants, have standing to object to such service by means that violate Brazilian law. We note that plaintiff does not appear to argue that any defendants failed to preserve the objection to the manner in which service of process was effected in Brazil.

Finally, we are also unpersuaded by plaintiff's argument that he effected service in accordance with the Mutual Legal Assistance Treaty on Criminal Matters (MLAT) between the United States and Brazil. Plaintiff does not claim to have complied with the procedures specifically prescribed by MLAT, and, in our view, he has not demonstrated that he effected service in accordance with a "bilateral arrangement,

agreement, or practice" within MLAT's contemplation.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Martin Shulman, J.), entered February 27, 2007, which denied plaintiff's motion to confirm an attachment order dated August 2, 2006, granted defendants' cross motions to vacate the same attachment order and to dismiss the complaint, dismissed the complaint with prejudice and directed plaintiff to return to defendants all assets being held pursuant to the attachment order, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 15, 2007, which denied plaintiff's ex parte application to file affidavits of service out of time and have them deemed timely filed, nunc pro tunc, unanimously dismissed, without costs, as taken from an order not appealable as of right.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 28, 2007

/s/ David Spokony
**DEPUTY CLERK**
CLERK

Nos. 08-4664 & 08-4872
(consolidated)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

v.

MARIA COROLINA [sic] NOLASCO,

Farswiss Asset Management Ltd.; Harber Corporation; Mabon Corporation; Gatex Corporation; Piedade Pedro Almeida; Avion Resources Ltd; Fares Baptista Pinto; Jose Baptista Pinto Neto; Tigrus Corporation; Pompeu Costa Lima Pinheiro Maia; Isabel Cristina Dutra Pinheiro Maia,

Appellants in 08-4664.

Midland Financial, Inc.,

Appellant in 08-4872.

## GOVERNMENT'S MOTION TO PUBLISH PANEL OPINION

(Filed Dec. 8, 2009)

The United States of America moves this Court to publish the panel opinion issued on December 4, 2009, and in support of this motion states as follows:

1. On December 4, 2009, a panel of this Court (Barry, J.; Rendell and Chagares, JJ., joining) issued

a not precedential opinion deciding two issues. First, the panel, after applying principles of statutory construction and considering legislative history, held unambiguously that an ancillary proceeding under 21 U.S.C. § 853(n) is not a "civil proceeding to forfeit property" for purposes of 28 U.S.C. § 2465(b), the fee-shifting provision of the Civil Asset Forfeiture Reform Act, and thus is not a basis for obtaining attorneys' fees from the Government. Second, the panel joined a majority of circuits in holding that interest on funds seized by the Government cannot be disgorged to litigants in the absence of a statute abrogating the United States' sovereign immunity.

2. Both holdings decided issues of first impression in this Circuit. This Court's discussion of the first issue, moreover, is the most clear and decisive of any Circuit thus far and resolves an issue that has divided the district courts. *See United States v. Moser*, ___ F.3d ___, 2009 WL, 3837292 (8th Cir. Nov. 18, 2009) (finding it unclear whether the § 853(n) proceeding was one "to forfeit property" but affirming the denial of attorney's fees because the Court could not say that Congress had unambiguously waived the Government's sovereign immunity); *United States v. Buk,* 314 Fed. App'x 565 (4th Cir. 2009) (unpublished) (declining to resolve the issue on mootness grounds); *United States v. D'Esclavelles,* 541 F. Supp. 2d 794 (E.D. Va. 2008) (finding for claimants), *rev'd on other grounds Buk,* 314 Fed. App'x at 565; *United States v. Gardiner,* 512 F. Supp. 2d 1270, 1272 (S.D. Fla. 2007) (finding for Government).

3. Publishing the panel's opinion will provide needed guidance to District Judges within this Circuit who must resolve motions for attorneys' fees and interest from successful claimants in ancillary proceedings. Publication will also provide useful guidance to other courts faced with the first issue decided by the panel.

4. Moreover, the two issues resolved by the panel are likely to recur. There are numerous statutes giving rise to criminal forfeiture. *Selected Federal Asset Forfeiture Statutes at i-vii.* Further, the United States routinely invokes these statutes to seize property constituting the proceeds of criminal activity and to require the nominal defendant to forfeit his or her interest in that property. Third parties claiming an interest in that same property frequently commence ancillary proceedings to prevent forfeiture of such property. Publishing the panel's opinion will ensure that district courts faced with such claims know the rules regarding whether attorney's fees and interest are available.

5. Finally, the panel opinion is publishable in its current form and would require only one modification: *i.e.*, striking the words "Because we write solely for the parties' benefit," in the first sentence under Section I on page 2 of the slip opinion, and beginning that Section instead with "We set forth only those facts necessary to our analysis."

WHEREFORE, for these reasons, the government respectfully requests that the Court publish its

opinion in this appeal. *See United States v. Jones*, 566 F.3d 353, 356 (3d Cir. 2009) (granting Government's motion to publish opinion).

PAUL J. FISHMAN
United States Attorney

By: s/ STEVEN G. SANDERS
Assistant U.S. Attorney

December 8, 2009
Newark, New Jersey

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**CERTIFICATE OF SERVICE**

I hereby certify that I today caused the foregoing Motion to Publish Panel Opinion to be served on Bernard D'Orazio, Esq., James G. McCarney, Esq., and John P. Gleason, Esq., counsel for Appellants, by virtue of the Notice of Docketing Activity issued by this Court's CM/ECF system.

s/ STEVEN G. SANDERS
Assistant U.S. Attorney

Dated: December 8, 2009